89-266

Supreme Court, U.S.
FILED
AUG 7 1989

No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

PORTLAND GENERAL ELECTRIC COMPANY,
Petitioner,

v.

MONTANA DEPARTMENT OF REVENUE,
et al.,
Respondents.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE MONTANA SUPREME COURT

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August 7, 1988
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CONSTITUTIONAL AND STATUTORY PROVISIONS

The Supremacy Clause of the United States Constitution, article VI, clause 2, provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Consitution or Laws of any State to the Contrary notwithstanding.

The Commerce Clause of the United States Constitution, article I, section 8, clause 3, provides:

> [The Congress shall have power] To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

Section 2121(a) of the Tax Reform Act of 1978, 15 U.S.C. § 391 (1982) ("Anti-Discrimination Act"), provides:

> No State, or political subdivision thereof, may impose or assess a tax on or with respect to the generation or transmission of electricity which discriminates against out-of-state manufacturers, producers, wholesalers, retailers, or consumers of that electricity. For the purposes of this section a tax is discriminatory if it results, either directly or indirectly, in a greater tax burden on electricity which is generated and transmitted in interstate commerce than on electricity which is generated and transmitted in intrastate commerce.

The fourteenth amendment to the United States Constitution, section 1, provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 4 of the Pacific Northwest Federal Transmission System Act, 16 U.S.C. § 838b (1982), provides:

> The Secretary of Energy, acting by and through the Administrator [of the Bonneville Power Administration] shall operate and maintain the Federal transmission system within the Pacific Northwest and shall construct improvements, betterments, and additions to and replacements of such system within the Pacific Northwest as he determines are appropriate and required to:
>
> (a) integrate and transmit the electric power from existing or additional Federal or non-Federal generating units;
>
> (b) provide service to the Administrator's customers;
>
> (c) provide interregional transmission facilities, or
>
> (d) maintain the electrical stability and electrical reliability of the Federal system; *provided, however*, That the Administrator shall not construct any transmission facilities outside the Pacific Northwest, excepting customer service facilities within any contiguous areas, not in excess of seventy-five airline miles from said region, which are a part of the service area of a distribution cooperative which has (i) no generating facilities, and (ii) a distribution system from which it serves both within and without said region, nor shall he commence construction of any major transmission facility within the Pacific Northwest, unless the expenditure of the funds for the initiation of such construction is specifically approved by Act of Congress.

Section 7(m) of the Pacific Northwest Electric Power Planning and Conservation Act of 1980, 16 U.S.C. § 839e(m) (1982), provides:

> (1) Beginning the first fiscal year after the plan and program required by section 839b(d) and (h) of this title are finally adopted, the Administrator may, subject to the provisions of this section, make annual impact aid payments to the appropriate local governments within the region with respect to major transmission facilities of the Administrator, as defined in section 3(c) of the Federal Columbia River Transmission Act —
>
> (A) which are located within the jurisdictional boundaries of such governments,
>
> (B) which are determined by the Administrator to have a substantial impact on such governments, and
>
> (C) where the construction of such facilities, or any modification thereof, is completed after December 5, 1980, and, in the case of a modification of an existing facility, such modification substantially increases the capacity of such existing transmission facility.
>
> (2) Payments made under this subsection for any fiscal year shall be determined by the Administrator pursuant to a regionwide, uniform formula to be established by rule in accordance with the procedures set forth in subsection (i) of this section. Such rule shall become effective upon its approval, after considering its effect on rates established pursuant to this section, by the Federal Energy Regulatory Commission. In developing such formula, the Administrator shall identify, and take into account, the local governmental services provided to the Administrator concerning such facilities and the associated costs to such governments as the result of such facilities.

(3) Payments made pursuant to this subsection shall be made solely from the fund established by section 11 of the Federal Columbia River Transmission System Act. The provisions of section 13 of such Act, and any appropriations provided to the Administrator under any law, shall not be available for such payments. The authorization of payments under this subsection shall not be construed as an obligation of the United States.

(4) No payment may be made under this subsection with respect to any land or interests in land owned by the United States within the region and administered by any Federal agency (other than the Administrator), without regard to how the United States obtained ownership thereof, including lands or interests therein acquired or withdrawn by a Federal agency for purposes of such agency and subsequently made available to the Administrator for such facilities.

Section 1341 of Title 28, U.S.C. (1982), provides:

The district courts shall not enjoin, suspend, or restrain the assessment, levy, or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State.

Montana's "beneficial-use" tax statute, Mont. Code Ann. § 15-24-1203 (1987), provides (the penultimate sentence was added by the 1983 Legislature, and the last sentence was added by the 1987 Legislature):

> After March 17, 1969, there is imposed and shall be collected a tax upon the possession or other beneficial use enjoyed by any private individual, association, or corporation of any property, real or personal, which for any reason is exempt from taxation. No tax may be imposed upon the possession or other beneficial use of buildings owned by public entities and located upon public airports. However, privately owned buildings located on such airport property are subject to tax. No tax shall be imposed upon the possession or other beneficial use of public lands occupied under the terms of mineral, timber or grazing leases or permits issued by the United States or the State of Montana or upon any easement unless the lease, permit, or easement entitles the lessee or permittee to exclusive possession of the premises to which the lease, permit, or easement relates. The tax shall be imposed upon the possession or other beneficial use of an electric transmission line and associated facilities, except that lines and facilities of a design capacity of less than 500 kilovolts shall not be subject to the tax. The tax may not be imposed upon the possession or other beneficial use of railroad right-of-way or track acquired by the state pursuant to Title 60, chapter 11, part 1, as long as the state retains ownership and the right-of-way and track is [*sic*] used exclusively for rail transportation.

Montana's definition of Class Eleven property, Mont. Code Ann. § 15-6-141 (1987) provides:

(1) Class eleven property includes:

(a) centrally assessed electric power companies' allocations, including, if congress passes legislation that allows the state to tax property owned by an agency created by congress to transmit or distribute electrical energy, allocations of properties constructed, owned, or operated by a public agency created by the congress to transmit or distribute electric energy produced at privately owned generating facilities (not including rural electric cooperatives);

(b) allocations for centrally assessed natural gas companies having a major distribution system in this state; and

(c) centrally assessed companies' allocations except:

(i) electric power and natural gas companies' property

(ii) property owned by cooperative rural electric and cooperative rural telephone associations and classified in class five;

(iii) property owned by organizations providing telephone communications to rural areas and classified in class seven;

(iv) railroad transportation property included in class fifteen; and

(v) airline transportation property included in class seventeen.

(2) Class eleven property is taxed at 12% of market value.

Montana's definition of Class Five property, Mont Code Ann. § 15-6-135 (1987), provides:

(1) Class five property includes:

(a) all property used and owned by cooperative rural electrical and cooperative rural telephone associations organized under the laws of Montana, except property owned by cooperative organizations described in subsection (1)(b) of 15-6-137;

(b) air and water pollution control equipment as defined in this section;

(c) new industrial property as defined in this section;

(d) any personal or real property used primarily in the production of gasohol during construction and for the first 3 years of its operation;

(e) all land and improvements and all personal property owned by a research and development firm, provided that the property is actively devoted to research and development;

(f) machinery and equipment used in electrolytic reduction facilities.

(2)(a) "Air and water pollution equipment" means facilities, machinery, or equipment used to reduce or control water or atmospheric pollution or contamination by removing, reducing, altering, disposing, or storing pollutants, contaminants, wastes, or heat. The department of health and environmental sciences shall determine if such utilization is being made.

(b) The department of health and environmental sciences' determination as to air and water pollution equipment may be appealed to the board of health and environmental sciences and may not be appealed to either a county tax appeal board or the state tax appeal board. However, the appraised value of the equipment as determined by the department of revenue may be appealed to the county tax appeal board and the state tax appeal board.

(3) "New industrial property" means any new industrial plant, including land, buildings, machinery, and fixtures, used by new industries during the first 3 years of their operation. The property

may not have been assessed within the state of Montana prior to July 1, 1961.

(4)(a) "New industry" means any person, corporation, firm, partnership, association, or other group that establishes a new plant in Montana for the operation of a new industrial endeavor, as distinguished from a mere expansion, reorganization, or merger of an existing industry.

(b) New industry includes only those industries that:

(i) manufacture, mill, mine, produce, process, or fabricate materials;

(ii) do similar work, employing capital and labor, in which materials unserviceable in their natural state are extracted, processed, or made fit for use or are substantially altered or treated so as to create commercial products or materials; or

(iii) engage in the mechanical or chemical transformation of materials or substances into new products in the manner defined as manufacturing in the 1972 Standard Industrial Classification Manual prepared by the United states office of management and budget.

(5) New industrial property does not include:

(a) property used by retail or wholesale merchants, commercial services of any time, agriculture, trades, or professions;

(b) a plant that will create adverse impact on existing state, county, or municipal services; or

(c) property used or employed in any industrial plant that has been in operation in this state for 3 years or longer.

(6) Class five property is taxed at 3% of its market value.

MONTANA FIRST JUDICIAL DISTRICT COURT
LEWIS AND CLARK COUNTY

PORTLAND GENERAL ELECTRIC COMPANY,
Plaintiff,

-vs-

THE DEPARTMENT OF REVENUE OF THE STATE OF MONTANA; MINERAL COUNTY;
BILLYE ANN BRICKER, Treasurer of Mineral County;
SANDERS COUNTY; JUNE M. THAYER,
Treasurer of Sanders County; and
ED ARGENBRIGHT, Montana State Superintendent
of Public Instruction,
Defendants.

Cause No. ADV-86-200

ORDER

This is a proceeding for declaratory and injunctive relief brought under Section 15-1-406, MCA, and Title 27, Chapter 8, MCA, to determine the validity of a beneficial use tax set forth in Section 15-24-1203, MCA, which has been assessed against Plaintiff for the year 1985 with regard to the 500 kV transmission lines between Hot Springs, Montana and the Idaho border.

Plaintiff is Portland General Electric Company (PGE), an Oregon corporation which provides retail electric utility service to customers in Oregon. Defendants are the Montana Department of Revenue (DOR); Mineral and Sanders counties; Billye Anne Bricker and June M. Thayer, the county treasurers of the above counties; and Ed Argenbright, State Superintendant of Public Instruction.

Most of the background of this case is the same as that set forth on pages 3-22 of this Court's Order in Cause No. 50978 dated December 21, 1987. The additional facts relevant to this case are set forth below.

Because PGE and the other Colstrip Owners "requested Bonneville to provide adequate transmission facilities and services west of Garrison, Montana to transmit to Colstrip power on a firm basis over the Federal Transmission system to their system loads and [because] Bonneville .... agreed to provide such transmission facilities and services," PGE and the Bonneville Power Administration (BPA) entered into the Garrison West Agreement on April 17, 1981. (Plaintiff's Exhibit 14 in Cause No. 50978 at 2 - 3) Under such Agreement, PGE made available and BPA was required to accept scheduled power not to exceed the reserved transmission demand set forth on Exhibit D of the Agreement. Exhibit D provided that from the effective date of the exhibit [the date of commercial operation of Colstrip Unit No. 3, i.e., October of 1983 — See Pretrial Order at 5] until the date when a 500 kV transmission line connecting Garrison to the Federal 500 kV main transmission system at or west of Hot Springs first became available for scheduling power, (i.e., 1986) the transmission demand for PGE was 0 kV. However, according to the footnote following this transmission demand of zero, PGE was to advise BPA of its transmission demand by April 6, 1982. The footnote also provided that the sum of the Colstrip Owners' transmission demands was limited to 330 megawatts.

On December 20, 1983, Richard Cromer of the Montana Power Company (one of the Colstrip Owners) wrote to Thomas Noguchi of

BPA as follows:

> The Colstrip Owners have just recently reached agreement on the following allocation of BPA's 330 MWs:
>
> > Effective for the period beginning at 2400 hours on the date of commercial operation of Colstrip No. 3 and ending at 2400 hours on the date when a 500 kV line connecting Garrison to the Federal 500 kV main transmission system at or west of Hot Springs (Taft) first becomes available for scheduling power; the agreed upon allocation of Bonneville's 330 MW transfer capability is:

Company	Bonneville Contract No.	Transmission Demand
. . .		
Portland	DE-MS79-81BP90167	65MW

(Defendants' Exhibit 3 in Cause No. 86-200)
BPA responded on February 14, 1984 stating:

> This is to confirm that each of your companies .... has sent BPA a letter agreeing with the allocation, contained in Montana Power Company's letter dated December 20, 1983, of the 330 MW of transmission capacity available to the Colstrip owners on BPA's Garrison-Hot Springs transmission line during the period starting with commercial operation of Colstrip Unit No. 3 and ending at 2400 hours on the date when the Garrison-Taft 500 kV transmission line is available for scheduling power, pursuant to existing contracts for wheeling Colstrip power.
>
> . . .

Company	Bonneville Contract No.	Transmission Demand
. . .		
Portland	DE-MS79-81BP00167	65MW

(Defendants' Exhibit No. 2 in Cause No. 86-200) (Emphasis supplied) According to Plaintiff's Exhibit 35 [Cause No. 86-200], Exhibit D of PGE's Garrison West Agreement was subsequently revised to show a transmission demand of 65 MW.

The term of PGE's Garrison West Agreement is 22 years and PGE has the right to renew. PGE had no other agreement for the transmission of its Colstrip power to points west. After scheduling over the Hot Springs to border lines began in October of 1983, PGE became obligated to pay a monthly charge to BPA calculated pursuant to the terms of the Agreement.

The term of PGE's Garrison West Agreement is 22 years and PGE has the right to renew. PGE had no other agreement for the transmission of its Colstrip power to points west. After scheduling over the Hot Springs to border lines began in October of 1983, PGE became obligated to pay a monthly charge to BPA calculated pursuant to the terms of the Agreement.

In 1985, PGE submitted a report pursuant to Rule 42.22.107, ARM, stating that it "had no possession or use of a government-owned transmission line in 1984; it had only a contract right to certain services provided by Bonneville Power Administration ("Bonneville") on the 500-kilovolt transmission line of Townsend-to-Garrison and Hot Springs-to-Idaho border. (Defendants' Ex. 28, Cause No. 50978) (Emphasis supplied) DOR assessed the Hot Springs to border line based on such report. (Tr. at 226) Ms. Whittinghill did not receive reports from any of the other Colstrip Owners or any other entities with respect to the use of this portion of the line during 1984. (Tr. at 228) With regard to BPA's preference customers, namely cooperatives, Ms. Whittinghill stated that it was not DOR's "impression that any cooperatives were wheeling or using these power lines to transfer their own power on these government lines." (Tr. at 259)

DOR prepared a beneficial use tax assessment for PGE for 1985 using the unit approach. Unlike its assessment in Cause No. 50978, DOR, in its first assessment of the Hot Springs to border lines, capitalized payments made by PGE to BPA in 1984. However, after deposing several PGE and BPA officials in 1986, DOR and PGE learned that BPA's charges represented charges for use of both 230 and 500 kV lines. DOR then issued a revised assessment excluding the 230 kV lines. Ms. Whittinghill testified as follows:

> This time in order to — this time in order not to have any 230 kV line charges included in our assessment we asked them to provide us specifically with detailed cost information on charge or installed cost of the entire portion of the Dworshak to Hot Springs power line located within the State of Montana.

(Tr. at 244)

Ms. Whittinghill determined the cost of the Hot Springs to border line at about $11,500,000 on the basis of Defendants' Exhibit 1 — "Plant Investment, Analyzed Plant by Work Order Number" dated October 21 and 22, 1986. (Tr. at 244-249) Then, as per the information provided by Mr. Eskridge of BPA, she awarded 13 years of depreciation based upon a 35-year life. (Id.) After depreciation, the line was valued at about $7,000,000. (Tr. at 249) Then, based upon Mr. Eskridges's statement that the "total transmission capacity is 1,300 megawatts" [see Defendants' Exhibit 22] and the firm reserved transmission demand of 65 MW [see p.4 of this Opinion], Ms. Whittinghill obtained a 5% figure ($^{65}/_{1300}$). Ms. Whittinghill then "multiplied five percent, which is the relationship of their (PGE's) use of that line to the total capacity, times the total depreciated cost of that line to determine Portland General Electric's value for that line for 1985." (Tr. at 250-1) The result was $360,365. As in Cause No. 50978, DOR incorporated such amount into the cost indicator which was then weighted by 40% and added to the income and stock and debt indicators. (See Defendants' Exhibit 17) The resulting figure was multiplied by the percentage of PGE's value subject to assessment in Montana and then apportioned to each of the appropriate taxing jurisdictions.

Ms. Whittinghill testified that she did not include any influence or effect of the utilization of a 230 kV transmission line property because she "only utilized the total cost of the Dworshak [Hot Springs] line." (Tr. 255) Ms. Whittinghill also testified:

> It was our understanding initially that from conversations with Bonneville Power representatives that the Dworshak power line in fact had to be used to transfer power outside of Montana, if the power companies were

not having some type of wheeling arrangements with either Montana Power or Washington Water Power, that in fact that the Dworshak line would have been – in their assumption of their contract path or whatever would have been in there, and that is why our assumptions have the Dworshak line as being used.

(Tr. at p. 271)

Q .... I would like to refer that back to you and ask you why you assumed in 1985 that Dworshak was the only line for which – which would be used by Bonneville to make the deliveries under the Garrison West contract?

A. Well if we want to back up, I would say that the first indication that I had that – from Portland General Electric, that the power line was being utilized, was their report to the department that specifically broke down their allocated use of the line based on charges. At that point it was really not known that the 230 kV charges were included in those wheeling or contract charges that Portland General Electric was paying to Bonneville. It was also then through conversations with Bonneville personnel indicated to the department that that would be basically the assumed contract path for purpose of determining the airline miles to transmit Colstrip power out of Montana.

(Tr. at p. 280)

In responding to DOR's inquiries, PGE stated as follows:

BPA's transmission service charges paid as they relate to the Colstrip Unit #3 project are as follows:

$3,380,840 Townsend Substation to Garrison Substation

$1,300,377 Garrison Substation to Pearl Substation (in Oregon)

Since the physical wheeling of energy is not specific as to which lines the energy transmits over but rather the energy can be traveling over various lines as long as the final end result or delivery point is to where our

> contracts specify, PGE cannot proportion the exact service charges for the transmission lines in the State of Montana. However, if one can say that the wheeling of power is transmitted over the most direct transmission line to the delivery point, then all Townsend-Garrison service charges and an estimated 63 miles of 632 miles of the Garrison-Pearl service charges relate to the State of Montana government lines 500 kV or greater.
>
> BPA's intertie wheeling charges for Colstrip in 1984 is $574,298 for power transmitted from Hot Springs Substation to Pearl Substation. Again, if the most direct pathways are used, then an estimated 63 miles of the total estimated 500 miles of the charges relate to the State of Montana government transmission lines 500 kV or greater.

(Plaintiff's Exhibit 36)

And, as quoted earlier in this Opinion, PGE also stated that it "had only a contract right to certain services provided by Bonneville Power Administration .... on the 500-kilovolt transmission line of .... Hot Spring-to-Idaho border." (Plaintiff's Exhibit 29)

Lastly, as stated in this Court's Opinion in Cause No. 50978: "The choice for long distance transmission, i.e., over 100 miles, would be the highest voltage line which, in the case of BPA's system, would be 500 kV."

Plaintiff sets forth eight counts alleging that the imposition of the beneficial use tax is illegal. Seven of the counts are the same or very similar to the seven counts set forth in Cause No. 50978. This Court's Opinion in Cause No. 50978 is equally applicable to the seven counts raised in this Cause No. 86-200. PGE has a clearly distinguishable use interest in the Hot Springs to border 500 kV line. Plaintiffs first seven counts fail as per the reasoning set forth in the Opinion dated December 21, 1987 in Cause No. 50978.

In Count 8 of its Complaint, PGE contends that the beneficial use tax is illegal in that it taxes BPA lines of under 500 kV which are statutorily exempt from taxation. However, the testimony of the witnesses and the parties' exhibits indicate otherwise. Plaintiff's eighth claim also fails.

Plaintiff has not sustained its burden of proving that the imposition of beneficial use taxes pursuant to Section 15-24-1203, MCA, violates any statutory or constitutional rights. Therefore, this Court finds that such taxes have been lawfully imposed. Such taxes shall be disbursed from the protest accounts in which they are presently being held and shall be distributed as per Section 15-1-402, MCA.

IT IS SO ORDERED:

DATED this 19th day of January, 1988.

DISTRICT JUDGE

pc: Counsel of record

No. 88-160

IN THE SUPREME COURT OF THE STATE OF MONTANA

1989

PORTLAND GENERAL ELECTRIC COMPANY,
Plaintiff and Appellant,

-vs-

MONTANA DEPARTMENT OF REVENUE,
et al.,
Defendants and Respondents.

APPEAL FROM: District Court of the First Judicial District In and for the County of Lewis & Clark, The Honorable Henry Loble, Judge presiding.

COUNSEL OF RECORD:

For Appellant:

Donald R. Murray; Murphy, Robinson, Heckathorn & Phillips, Kalispell, Montana
Thomas H. Nelson argued; Stoel Rives, Boley, Jones & Grey, Portland, Oregon

For Respondent:

Larry G. Schuster argued, Department of Revenue, Helena, Montana

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Submitted: February 28, 1989
Decided: May 10, 1989

Mr. Justice John Conway Harrison delivered the Opinion of the Court.

Appellant, Portland General Electric (hereinafter PGE), appeals an order entered by the Honorable Henry Loble, First Judicial District Court, Lewis and Clark County, Montana, denying injunctive and declaratory relief. We afffirm.

This case concerns the imposition of beneficial use taxes, pursuant to § 15-24-1203, MCA (1983), for appellant's use of the Hot Springs to Idaho Border portion of the BPA 500 kilovolts (KV) transmission line system within the State of Montana.

> [T]here is imposed and shall be collected a tax upon the possession or other beneficial use enjoyed by any private individual, association, or corporation of any property, real or personal, which for any reason is exempt from taxation .... The tax shall be imposed upon the possession or other beneficial use of an electric transmission line and associated facilities, except that lines and facilities of a design capacity of less than 500 kilovolts shall not be subject to the tax.

Section 15-24-1203, MCA.

Much of the factual background surrounding this case has previously been discussed in our decision, Pacific Power & Light Co. v. Department of Revenue, No. 88-151, decided April 17, 1989. Therefore, we will limit the extensive background discussion and instead focus on the additional facts relevant to this case.

PGE is an investor-owned utility which provides retail electric utility service to customers located in the State of Oregon. PGE owns an undivided 20% interest in Colstrip Units III and IV, which began operation in October of 1983 and 1985, respectively. The other four Colstrip owners are Pacific Power & Light Company, Washington Water Power Company, Puget Sound Power & Light Company, and Montana Power Company. Collectively, these companies are referred to as the "Colstrip Owners."

With the development of Colstrip Units III and IV, additional transmission capacity was needed from the Colstrip facilities to the west. To accommodate the increased generation, Colstrip Owners initially

converted one 230 KV line extending from the generating facilities to a substation near Broadview, Montana, to 500 KV and constructed a second 500 KV line. From the Broadview substation, the Colstrip Owners' 500 KV lines extend westward to a point near Townsend, Montana. At Townsend, the Colstrip Owners' 500 KV lines interconnect with the Bonneville Power Administration's (BPA) 500 KV lines. The portion extending from Townsend to the BPA's Garrison substation is referred to as the Montana Intertie, and is extensively discussed in our previous opinion, Pacific Power & Light Co. In 1986, anticipating the completion of Colstrip Unit IV, the BPA, at the request of the Colstrip Owners, completed the Garrison-West lines connecting the Garrison substation to the Taft, Montana, substation and points to the west. Prior to the completion of the Garrison-Taft 500 KV transmission lines, the Hot Springs-Dworshak lines were the only existing 500 KV lines providing access to the west.

From the BPA substation at Garrison, Montana, the transmission of Colstrip power is governed by separate contracts, commonly referred to as the Garrison-West Agreement. These contracts continue for a period of 22 years, with a right to renew at comparable terms. Under each Owners' separate contract with the BPA, power would be introduced at the Garrison substation and transmitted across the entire BPA "main grid" which included both 230 and 500 KV lines. Notably, appellant entered into no other agreement for the transmission of its Colstrip power to points west.

Under the terms of PGE's agreement with the BPA, PGE requested BPA provide adequate transmission facilities west of Garrison, Montana, to transmit power on a firm basis over the Federal Transmission System to PGE's system load at the Pearl substation in Oregon. PGE made available and BPA was required to accept scheduled power not to exceed the reserved transmission demand set forth on Exhibit D of the Garrison-West Agreement. Exhibit D provided that from the date of commercial operation of Colstrip Unit III until the date when the 500 KV transmission lines connecting Garrison to the Federal 500 KV transmission system first became available for scheduling power (the Garrison-Taft lines), the transmission demand for PGE was zero. However, a footnote to Exhibit D provided for the five Colstrip owners to allocate BPA's available 330 megawatts transmission capacity.

At this point, a brief explanation describing the 330 megawatt limitation is in order. From the Garrison substation to points west, the BPA lacked transmission line capacity to accomodate full transmission of Colstrip power to the Owners' individual system loads. This lack of transmission capacity is due to a gap in the 500 KV lines between the Garrison substation and the Hot Springs substation, referred to in this litigation as the "bottleneck." Between the two substations, the BPA had only 230 KV lines, which proved insufficient to accommodate the total scheduled Colstrip power. Recognizing its inability to fulfill obligations under the Garrison-West Agreements, the BPA imposed a 330 megawatt limitation upon the amount of power which could be scheduled west of the Garrison substation, until the Garrison-Taft 500 KV lines were completed.

On December 20, 1983, a Montana Power Company representative contacted BPA officials indicating Colstrip Owners had reached an agreement on the allocation of BPA's 330 megawatts. Respectively, PGE was allocated 65 megawatts transmission demand. The reserved amount is reflected in a revised Exhibit D to the PGE's Garrison-West Agreement. In turn, the BPA responded on February 4, 1984, stating:

> This is to confirm that each of your companies [Colstrip Owners] has sent BPA a letter agreeing with the allocation, contained in The Montana Power Company's letter dated December 20, 1983, of the 330 MW of transmission capacity available to the Colstrip owners on BPA's Garrison-Hot Springs transmission line during the period starting with commercial operation of Colstrip Unit No. 3 and ending at 2400 hours on the date when the Garrison-Taft 500 kV transmission line is available for scheduling power, pursuant to existing contracts for wheeling Colstrip power.
>
> . . .
>
> | Company | Bonneville Contract No. | Transmission Demand |
> |---|---|---|
> | . . . | | |
> | Portland | DE-MS79-81BP00167 | 65 MW |

Once scheduling of Colstrip power over the Hot Springs to border line began, PGE was required to pay BPA a monthly charge calculated pursuant to the terms of the Garrison-West Agreement. The transfer of energy was "deemed" to have occurred whether or not there was actual physical transmission. Therefore, the monthly charge was due BPA regardless of PGE's actual transmission flow across the lines.

Beginning in the tax year 1985, the Department of Revenue (DOR) imposed taxes upon appellant for its "beneficial use" of the BPA 500 KV transmission lines from Hot Springs to the Idaho border. The assessment was based upon a report submitted by PGE, pursuant to Rule 42.22.107, ARM, stating that it"had no possession or use of a government-owned transmission line in 1984; it had only a contract right to certain services provided by the Bonneville Power Administration ("Bonneville") on the 500-kilovolt transmission line" between Townsend-to-Garrison and Hot Springs-to-Idaho border. The other Colstrip Owners did not submit similar reports to the DOR. The DOR prepared a beneficial use assessment for PGE using the unitary approach. Initially, the DOR assessed PGE's use of the Hot Springs to border lines based upon the capitalized payments made by PGE to the BPA in 1984. However, shortly before trial, depositions revealed such payments represented charges for the use of both 230 and 500 KV lines. Thereafter, the DOR prepared a revised assessment excluding the effect of tax-exempt 230 KV lines.

Appellant presents eight issues on appeal, each of which would invalidate the imposition of the challenged taxes. Three of the issues arise under the United States Constitution, three under the Montana Constitution and two are statutory challenges. However, our decision in Pacific Power & Light, Co. forecloses appellant's arguments of the first seven issues. Therefore, our opinion will deal exclusively with appellant's eighth issue contending that a portion of the beneficial use tax assessment was attributable to exempt property.

This case comes to us against a backdrop of extensive technological changes in the electrical transmission industry. Goldberg v. Sweet (1989), _____ U.S. _____, 109 S.Ct. 582, 102 L.Ed.2d. 607. As noted in the factual discussion, BPA's entire integrated network

is used to schedule power. The power transmitted across electrical lines can not be accurately identified, and indeed, the path taken is often indirect and bears no relation to contract requisites. Instead, we have only the input point and the eventual withdrawal of energy at a specified location. Between the two, various factors indicate a likely, though not actual, transmission path.

Initially, we discuss our determination that PGE possessed a "beneficial use" within the meaning of the statute. Contrary to appellant's argument, no physical possession, exclusive use or control of the facilities is necessary. Rather, "beneficial use" has long been defined as a right recognized by law and enforceable by the courts.

> The expression "beneficial use" or "beneficial ownership or interest" in property is quite frequent in the law, and means, in this connection, such a right to its enjoyment as exists where the legal title is in one person and the right to such beneficial use or interest is another, and where such right is recognized by law, and can be enforced by the courts, at the suit of such owner or of some one in his behalf.

Montana Catholic Missions v. Missoula county (1906), 200 U.S. 118, 127-128, 26 S.Ct. 197, 200, 50 L.Ed. 398, 402; See also Harrison v. City of Missoula (1965), 146 Mont. 420, 407 P.2d 703; Pacific Power & Light, Co. To advance its commercial activities, and thereby increase profits, PGE contracted for firm transmission capacity over the BPA lines. This is an enforceable contract interest in firm megawatts of power. While PGE may not possess the lines, nonetheless, the power flowing through the lines remain under PGE's ownership. Finally, PGE pays for the use of the lines regardless of the actual transmission flow. We find the reservation of firm transmission demand grants PGE an exclusive right taxable under § 15-24-1203, MCA.

The physical wheeling of energy is not specific as to which line it passes through, but rather the energy can travel through various lines as long as the delivery point is where the contract specifies. However, the facts reflect the essential nature of the Hot Springs-Dworshak lines. PGE contracts to transmit bulk transfers of power, necessitating the use of the higher voltage, lower impedance, 500

KV lines. Without the Hot Springs lines, the transfer capability of Colstrip power to the west would be substantially affected. Indeed, BPA officials indicated that it could not fulfill contract obligations absent the Hot Springs lines. Clearly, the Hot Springs lines are a vital portion of the BPA's main grid.

Appellant contends the DOR's assessment erroneously assumed that only 500 KV facilities would be used in providing services, ignoring the fact that a substantial portion of the transmission facilities consist of tax exempt 230 KV lines. PGE argues that in reality, the power is scheduled over the entire BPA transmission system and generally no line or path is associated with a particular power schedule.

The 500 KV lines from Hot Springs to the Idaho border are in the direct transmission path of PGE's bulk energy transfers to its Pearl substation. It is significant to note that no 230 KV lines exist parallel to the 500 KV lines. This fact strengthens the assumption that the 500 KV lines are essential to PGE's energy transfers in this case, and are properly taxed.

It is not disputed that the DOR did not rely on actual transmission flows. Rather, the assessment was based exclusively upon PGE's Garrison-West Agreement with the BPA providing for firm transmission rights. To eliminate any influence of 230 KV lines in the assessment, the DOR requested BPA to provide detailed information regarding the actual cost of the installed Hot Springs lines located within the State of Montana, and information regarding the total capacity of the lines and date of installation. From the total cost, the DOR applied a straight line depreciation to the amount, awarding 13 years depreciation based upon a 35 year life. To the depreciated cost, the DOR multiplied a fraction isolating PGE's interest in the lines, (denominator represents the lines' capacity; and the numerator consists of PGE's firm transmission demand). This value was then integrated into PGE's centralized assessment, and thereby subject to a 40% weighting figure which the DOR ascribes to the cost indicator. Puget Sound Power and Light Co. v. Department of Revenue (Mont. 1988), 761 P.2d 336, 45 St.Rep. 1078.

A tax for the beneficial use of property, as distinguished from a tax on property itself, is commonplace. Likewise, the United States

Supreme Court decisions support a tax measured by the value of the tax-exempt property:

> In measuring such a use tax it seems neither irregular nor extravagent to resort to the value of the property used; indeed no more so than measuring a sales tax by the value of the property sold .... In our judgment it was not an impermissible subterfuge but a permissible exercise of its taxing power for [the State] to compute its tax by the value of the property used.

United States v. City of Detroit (1958), 355 U.S. 466, 470, 78 S.Ct. 474, 476, 2 L.Ed.2d 424, 427; United States v. Boyd (1964), 378 U.S. 39, 84 S.Ct. 1518, 12 L.Ed.2d 713.

Reviewing the facts, we conclude that the tax was imposed on the privilege of using the property. The assessment reflects PGE's contractual reserve arrangement with the BPA, thereby ignoring actual flows and the lines' west to east transmission capacity.

Affirmed.

_____

Justice

We concur:

_____

Chief Justice

_____

_____

_____

_____

Justices

MONTANA FIRST JUDICIAL DISTRICT COURT
LEWIS AND CLARK COUNTY

PACIFIC POWER & LIGHT COMPANY,
an Assumed Business Name of PacifiCorp,
a Maine Corporation;
PORTLAND GENERAL ELECTRIC COMPANY,
an Oregon Corporation;
THE WASHINGTON WATER POWER COMPANY,
a Washington Corporation;
PUGET SOUND POWER & LIGHT COMPANY,
a Washington Corporation;
THE MONTANA POWER COMPANY,
a Montana Corporation,
Plaintiffs,

-vs-

DEPARTMENT OF REVENUE OF THE
STATE OF MONTANA; JEFFERSON COUNTY;
SUSAN MILLER, Treasurer of Jefferson County;
BROADWATER COUNTY; IRENE KEMMER,
Treasurer of Broadwater County;
POWELL COUNTY; DALICE M. COOK,
Treasurer of Powell County
GRANITE COUNTY; HARRIET L. RYAN,
Treasurer of Granite County;
MISSOULA COUNTY; FERN HART,
Treasurer of Missoula County;
MINERAL COUNTY; BILLYE ANN BRICKER,
Treasurer of Mineral County;
SANDERS COUNTY, JUNE M. THAYER,
Treasurer of Sanders County; and
ED ARGENBRIGHT,
Montana State Superintendent of Public Instruction
Defendants.

Cause No. 50978

ORDER

This is a proceeding for declaratory and injunctive relief brought under Section 15-1-406, MCA, and Title 27, Chapter 8, MCA to determine the validity of a beneficial use tax assessed against Plaintiffs for the year 1984 with regard to the 500 kV transmission line between Townsend, Montana and Garrison, Montana.

OVERVIEW

A. PARTIES

Plaintiffs are 1) Pacific Power & Light Company (Pacific), an assumed business name for the electric utility operations of PacificCorp, a Maine corporation which provides retail electric utility service to customers located in Oregon, Washington, Wyoming, California, Idaho and Montana; 2) Puget Sound Power and Light Company (Puget), a Washington corporation which provides retail electric utility service to customers located in the western Washington area; 3) Portland General Electric Company (PGE), an Oregon corporation which provides retail electric utility service to customers located in Oregon; 4) Washington Water Power Company (Washington Water), a Washington corporation which provides retail electric utility service to customers located predominantly in Washington and Idaho; and 5) the Montana Power Company (MPC), a Montana corporation which provides retail electric service to customers located in Montana. MPC and Puget own an undivided interest in Colstrip Units 1 and 2. Each Plaintiff owns an undivided interest in Colstrip Unit 3, and four of the five Plaintiffs own an undivided interest in Colstrip Unit 4. Collectively, Plaintiffs are referred to as the "Colstrip Owners."

Defendants are the Montana Department of Revenue (DOR), an administrative agency of the State of Montana charged with administering the tax laws of the State of Montana; the counties of Jefferson, Broadwater, Powell, Granite, Missoula, Mineral, and Sanders, political subdivisions of the State of Montana; the treasurers of the above counties, Susan Miller, Irene Kemmer, Dalice M. Cook, Harriet L. Ryan, Fern Hart, Billye Ann Bricker, and June Thayer; and Ed Argenbright, the State Superintendent of Public Instruction.

B. HISTORY

1. Colstrip 1 and 2

Colstrip, Montana became the site for two coal-fired electricity-generating stations in the mid-1970's when MPC and Puget constructed Colstrip Units 1 and 2. Colstrip Unit 1 was placed in commercial service on September 24, 1975 and Colstrip Unit 2 on May 22, 1976. Each unit is rated at 330 megawatts. MPC has operated and maintained these units and continues to do so.

A 230 kV line from the Billings area to Colstrip was built to help supply the necessary power to build the Colstrip facilities. Two 230 kV lines were constructed from the Colstrip facilities to a point near Broadview in order to move future energy out of Colstrip. (Tr. p. 202) The 230 kV lines were adequate for transmission of energy from Colstrip 1 and 2 to points west. (Tr. pp. 230-231, 233) MPC performed a wheeling service for Puget in order to get Puget's power to points west. (Tr. p. 231)

2. Colstrip 3 and 4

The Colstrip Owners subsequently constructed Colstrip Units 3 and 4. Each of these units is rated at 770 megawatts. Thus, approximately 2,200 megawatts of electric energy is generated at Colstrip Units 1, 2, 3, and 4. (Tr. p. 99) Colstrip Unit 3 was declared to be in commercial service in January of 1984 and Colstrip Unit 4 was so declared in April of 1986. (Pre-Trial p. 4)

Mr. Brush, an MPC employee, testified that, prior to constructing Colstrip Units 3 and 4, the Colstrip Owners knew there was insufficient transmission capacity to transmit power from those units to points west. (Tr. p. 231) The preexisting 230 kV lines were insufficient for transmission of power from Colstrip Units 1, 2, and 3. (Tr. p. 103) The additional megawatts from Units 3 and 4 necessitated a direct 500 kV path for purposes of transmission to Garrison. (Tr. p. 103) Plaintiffs concede that with the added generation from Units 3 and 4, increased transmission capability was needed. (Plaintiffs' Proposed Finding of Fact No. 7) Therefore, the Colstrip Owners converted the two 230 kV circuits to a single 500 kV transmission line, providing a direct path from Colstrip to Broadview. (Tr. p. 102) (The western United States has a maximum AC voltage of 500 kV. The choice for

long distance transmission, i.e., over 100 miles, would be the highest voltage line which, in the case of BPA's system, would be 500 kV. Long distance lines would generally be limited by stability. A stability limited 500 kV transmission line has the capacity to transmit approximately 4.7 times as much power as a stability limited 230 kV transmission line. (Tr. pp. 53, 56, 57) The Colstrip Owners also constructed a substation at Broadview. (Tr. pp. 232 and 102) Then they built a double circuit 500 kV transmission line from Broadview to a point near Townsend to accommodate the output of Colstrip Units 3 and 4 and Puget's share of 1 and 2. The capacity of both these segments of transmission line is about 2,000 megawatts. (Tr. pp. 234 and 105) It cost the Colstrip Owners $220,000,000 to build the Colstrip-Townsend lines. (Tr. pp. 235 and 236)

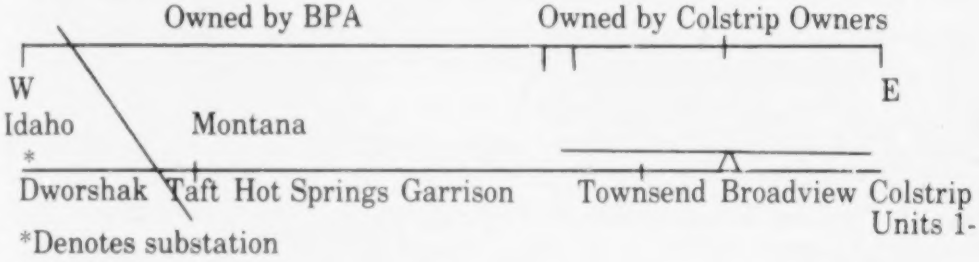
On behalf of the Colstrip Owners, MPC requested the Bonneville Power Administration (BPA) to interconnect the federal transmission system with the Colstrip Owners' project somewhere in the vicinity of Helena and Ovando. (Tr. p. 238) (Exhibit 4 4) The Colstrip Owners requested BPA's help because they were unable to obtain a right-of-way across an Indian reservation, and BPA had such a right-of-way that was thought to be sufficient to handle a 500 kV line. (Tr. p. 238) The Colstrip Owners wished to connect to the federal system because most of their load centers were located within BPA's service area. (Tr. p. 239) (See p. 2 of this Opinion. Only MPC and Pacific have customers in Montana.) BPA built 500 kV transmission lines commencing at Townsend. (Pre-trial p. 3)

The Townsend-Garrison segment was designed to specifically interact and be an integral part of the Colstrip-Garrison transmission project. (Tr. p. 104) Mr. Brush testified that if BPA had not constructed the line, someone, probably the Colstrip Owners, would have constructed it. (Tr. p. 240) Without the Townsend-Garrison segment, Colstrip Units 3 and 4 could not be effectively used. (Id.) There are no other adequate transmission paths by which Colstrip power from Units 1 through 4 could be transmitted to Garrison. (Tr. p. 104) It was necessary to have the complete Colstrip-Garrison transmission line system if power was to be transmitted from Colstrip to Garrison. (Tr. pp. 104 and 105) If 2,000 megawatts of energy were not available at Colstrip, the Broadview-Garrison segment would not have been constructed at the time it was. (Tr. pp.

374-375)

Although not at issue in this case, Colstrip generation also precipitated the construction of the Garrison-Taft line. (Id.)

The 500 kV transmission lines from Colstrip to the west are illustrated as follows:



*Denotes substation

There are no 500 kV transmission lines from Colstrip east. There are no other 500 kV lines in Montana.

3. BPA

a) General

Mr. Porter testified as follows:

> "The Bonneville Power Administration is a power marketing agency of the federal government. It is responsible for marketing the power that is generated by federal hydroelectric sites and other resources that are acquired by Bonneville in the Pacific Northwest. It essentially markets that power by selling it to the various customers in the northwest, preference customers and others."

(Tr. p. 32)

BPA is the dominant transmission system of the Pacific Northwest. (Tr. p. 303) It owns about ¾ of the total transmission grid in the northwest. (Tr. p. 36) The Federal Columbia River Transmission System is the system of transmission lines, substations, and related facilities owned by BPA plus those facilities over which BPA has obtained rights of usage through lease or other agreement. (Tr. pp. 35, 36, 330) Townsend, Montana is considered the eastern most part of

the Federal Columbia River Transmission System. (Tr. p. 330)

b) BPA Customers

i) Preference Customers

The Bonneville Project Act that established BPA provided that power generated by federal facilities should go first to public agencies including municipalities, co-ops, public utility districts and some federal agencies. (Tr. p. 35) These customers are preference customers. (Id.) Rural electric co-ops are one element of the preference customer class and, in Montana, include Lincoln Electric Cooperative, Flathead Electric Cooperative, Missoula Electric Cooperative, Ravalli County Electric Cooperative, Vigilante Electric Cooperative, and Glacier Electric Cooperative. (Tr. p.492) Most of BPA's preference customers in Montana are served through wheeling arrangements with an intermediate utility. (Tr. pp. 150-151) For example, MPC transmission lines are used to deliver federal power to Ravalli County Electric Cooperative. (Tr. p. 151) BPA makes enough energy available to MPC to cover the loads of BPA's customers. It was not necessary to build the Townsend-Garrison line to serve Montana preference customers. (Tr. p. 373) BPA did not construct the Townsend-Garrison line to serve BPA's preference customers (Tr. p. 264) Construction of the Colstrip Units did not enhance BPA's service to its preference customers although any time a major addition is made to the system, the system's reliability increases. (Tr. p. 566) The Townsend-Garrison transmission line is not designated as a transmission facility used to serve preference customers. (Tr. p. 151) The Townsend-Garrison line is not contractually used to serve BPA preference customers. BPA's preference customers are not billed for any use of the Townsend-Garrison line. (Tr. pp. 151-152, 581) There was no reason to believe that a 500 kV line from Townsend-Garrison was needed to provide adequate wheeling to BPA for preference customers. (Tr. p. 264 and 372)

ii) Direct Service Industry Customers

Direct Service Industry (DSI) customers are those who receive power directly from BPA for their own end use. (Tr. p. 485) They have access to the federal system but they do not have preference rights. (Tr. pp. 485-486) DSI loads are firm loads to which BPA is committed. (Tr. p. 570) The Columbia Falls aluminum plant is BPA's only Montana DSI. It has a power demand of 345 megawatts. (Tr. pp. 485-488)

c) Generation

Federal power is power from the federal generation system. There are two such facilities in Montana – the Libby project at about 500 megawatts and Hungry Horse at about 300 megawatts. (Tr. pp. 483 and 495) First call of that power goes to preference customers. However, with regard to Hungry Horse, the first preference is preference customers in western Montana. The second preference is preference customers in all of the State of Montana. The remaining power is available to the northwest. (Tr. p. 484) Generation from Libby and Hungry Horse is greater than the federal loads in western Montana. (Tr. at pp. 563 and 495)

d) Impact Aid Payments

Impact aid was available to Montana counties affected by the construction of the Townsend-Garrison 500 kV transmission line. Such aid was congressionally approved by virtue of the enactment of Section 7(m) of the Pacific Northwest Electric Power Planning and Conservation Act of 1980. However, BPA's impact aid policy was not promulgated until March 18, 1985 and was not approved by the Federal Energy Regulatory Commission until 1986.

BPA prepared its impact aid policy to provide for three types of impact aid: preconstruction, construction, and post-construction. Preconstruction impact aid was directly billable by the counties for services they provided primarily with regard to the location of the line. (Tr. pp. 503-504) No preconstruction aid was requested or paid. Mr. Eskridge testified that the Act had not been passed at the time applicable for preconstruction aid. (Tr. p. 506) Construction impact aid was designed by BPA to reimburse affected counties for the presence of a non-local work force during the construction period.

Mr. Eskridge testified:

> "[I]mpact aid again in our mind is only for the cost of the services provided to our people .... [I]t is reasonable to assume that our people, our construction people would utilize the library .... They utilize the police protection .... or police services, fire services, whatever. Those services they do utilize during the time they are there, so the philosophy of impact aid is that the counties should be compensated for providing that service."

(Tr. p. 515)

The following construction period impact aid payments were made to affected Montana counties for the Townsend-Garrison property:

Powell County (1982, 1983, 1984, and 1985)	$ 61,410.00
Broadwater County (1982 and 1983)	29,570.00
Jefferson County (1982 and 1983)	64,895.00
Missoula County (1983, 1984, and 1985)	51,466.00
Granite County (1983, 1984, 1985)	98,100.00
Mineral County (1984 and 1985)	155,606.00

Post-construction period impact aid is available as a direct charge by affected Montana counties for any actual services which they might render to BPA. As Mr. Eskridge explained:

> "Say somebody tore out the fence, and we asked the county to have their local sheriff's office investigate that and try to find the person responsible. Well then they could bill us for that activity on our behalf and we would pay it. Another example would be a fire. Say we had a fire in one of our facilities and the local rural fire department responded to that fire. Well then they could bill Bonneville for that service and we would in turn pay for that."

(Tr. p. 525)

Mr. Eskridge noted that such occurrences were not very common. (Id.) BPA has not paid or been requested to pay any post-construction period impact aid to any affected Montana county.

4. Montana Intertie Agreement (See Plaintiffs' Exhibit 7)

a) General

The transmission lines from Broadview to Garrison are known as the Montana Intertie. (Tr. p. 72) Under the Transmission Agreement between the United States acting by and through BPA and the Montana Intertie Users (the Colstrip Owners – MPC, Pacific, Puget, PGE, and Washington Water), BPA agreed to construct, operate, and maintain the 500 kV lines from Townsend to Garrison and the Garrison substation. In addition, BPA agreed to provide firm transmission services over the Montana Intertie from Townsend to Garrison for the Colstrip Owners in amounts not to exceed the east-west transmission demands specified for each owner in Exhibit D of the agreement. Such Exhibit provides:

	Townsend-Garrison East to West Transmission Demands
MPC	390,600 kW
Puget	655,500
PGE	260,400
Pacific	130,200
Washington	195,300
Basin*	98,000
	1,730,000 kW

(*Basin Electric subsequently withdrew from the agreement. Its transmission demand was reallocated among the Colstrip Owners according to their percentage of the total east-west demand. (Tr. p. 864) Thus, under the Montana Intertie agreement, Colstrip Owners have a contract path from Townsend to Garrison. (Tr. p. 360) The Colstrip Owners have reserved all but 185 megawatts of east-west transfer capacity across the line for 22 years. (Tr. p. 378) According to Exhibit D, the Townsend-Garrison line would carry all the power output from Colstrip Units 3 and 4 owned by MPC, PGE, Pacific, Washington Water and Puget. All of Puget's share of power from Units 1 and 2 would also be transmitted over the Townsend-Garrison line. Approximately 1,730 megawatts of the Colstrip Owners' power is scheduled over the Townsend-Garrison line. (Exhibit D of Exhibit 7) The Colstrip Owners have contracted for over 90% of the firm transmission capability of the Townsend-

Garrison line.

For their part of the agreement, the Colstrip Owners agreed to construct, operate, and maintain the Broadview-Townsend transmission line and other such facilities needed to transfer power to Broadview. In addition, the Colstrip Owners agreed to provide firm transmission services over the Montana Intertie from Broadview to Townsend to BPA not to exceed the east-west transmission demands specified for BPA in Exhibit D beginning on the date when a 500 kV transmission line, connecting Garrison to the 500 kV portion of the Federal transmission system, first became available for power. (Such a line did not become available until 1986. (Tr. p. 407) Exhibit D provides:

Bonneville 185,000 kW

Neither BPA nor Western Area Power Administration exercised its east-west transmission capability during the years 1983-1985. (Tr. p. 407) Plaintiffs state that BPA is currently using its 185 megawatt reservation to transmit WAPA power from east to west. (Plaintiffs' Findings #28)

Colstrip Owners have contracted for firm transmission services. According to the agreement, firm transmission means BPA is required to accept the full scheduled amounts of scheduled power to the extent that the amounts do not exceed the transmission demands specified in Exhibit D. BPA has also contracted with each Colstrip Owner to deliver power from the Garrison substation over the FCRTS to each of the Plaintiffs' retail service areas. (See Exhibits 8, 12, 13, 14 and 15)

Nonfirm transmission service is service that could be interrupted at the discretion of the wheeling party. (Tr. p. 172) If BPA could find a party that would contract for nonfirm services, such services would benefit BPA. (Tr. p. 176) Mr. Brush had no knowledge of any nonfirm transmissions across the Montana Intertie. (Tr. p. 261) Only after 1986 was there nonfirm use. (Tr. pp. 328 and 329)

There is no west-east firm transmission service. (Tr. p. 324) Plaintiffs state that BPA has reserved all west-east transmission to itself. (Plaintiffs' Finding No. 29) At the time of the 1984 and 1985 assessments, DOR had no knowledge of any users of the Townsend-Garrison line other than the Colstrip Owners.

The term of the agreement is 22 years. However, the Colstrip

Owners have a right to renew the Montana Intertie Agreement in terms not less favorable than those originally agreed to, for a period of time not to exceed the duration of the Colstrip generation projects.

b) Payments for Use of Montana Intertie

After scheduling over the Montana Intertie commenced in October 1983, the Colstrip Owners became legally obligated to pay a monthly Intertie Charge to the BPA pursuant to the terms of the agreement irrespective of whether any Colstrip power was transmitted over the Townsend-Garrison transmission line. (Plaintiffs' Exhibit 7) The Intertie Charge represents payment by the Colstrip Owners for the entire east-west capacity of the Townsend-Garrison transmission line, except for the 185 megawatt reservation in favor of the government. It is computed upon the following formula:

$$\text{Intertie Charge} = \left(\frac{\text{Total Annual Costs}}{12 \text{ Months}} - \text{Non-firm Revenues}\right) \times \frac{\text{Capacity Requirement - Exchange Credit}}{\text{Total Capacity Requirement}}$$

Total annual costs of facilities associated with the Townsend-Garrison line is the total of 1) interest and amortization of associated Federal investment and the appropriate allocation of general plant costs, 2) operation and maintenance costs, 3) an allowance for BPA's general administration costs which are appropriately allocable to such facilities, and 4) impact aid payments. Total annual costs will be adjusted to reflect reductions to unpaid total costs as a result of any amounts received, under agreements for firm transmission service over the Montana Intertie, by the govenment on account of any reduction in transmission demand, termination or partial termination of any such agreement or otherwise to compensate BPA for the unamortized investment, annual cost, removal, salvage or other cost related to such facilities. Subtracted from total annual costs is the nonfirm transmission charge times the total nonfirm energy transmitted over the Townsend-Garrison line and the total nonfirm energy transmitted in either direction by the government over the Townsend-Garrison line. A customer's capacity requirement equals its transmission demand as set forth in

Exhibit D. The capacity requirement is reduced by the exchange credit. As compensation for the transmission services provided to BPA by any of the Colstrip Owners, beginning when a 500 kV line connecting Garrison to the 500 kV portion of the Federal transmission system first became available, BPA agreed to provide an exchange credit in the calculation of the Colstrip Owners' Intertie Charge. The computation of the exchange credit is complex. Lastly, the total capacity requirement is 1,915 kV.

C. THE BENEFICIAL USE TAX ASSESSMENT

Section 15-24-1203, MCA, provides as follows:

> "After March 17, 1969, there is imposed and shall be collected a tax upon the possession or other beneficial use enjoyed by any private individual, association, or corporation of any property, real or personal, which for any reason is exempt from taxation. No tax may be imposed upon the possession or other beneficial use of buildings owned by public entities and located upon public airports. However, privately owned buildings located on such airport property are subject to tax. No tax shall be imposed upon the possession or other beneficial use of public lands occupied under the terms of mineral, timber, or grazing leases or permits issued by the United States or the state of Montana or upon any easement unless the lease, permit, or easement entitles the lessee or permittee to exclusive possession of the premises to which the lease, permit, or easement relates. The tax shall be imposed upon the possession or other beneficial use of an electric transmission line and associated facilities, except that lines and facilities of a design capacity of less than 500 kilovolts shall not be subject to the tax. The tax may not be imposed upon the possession or other beneficial use of railroad right-of-way or track acquired by the state pursuant to Title 60, chapter 11, part 1, as long as the state retains ownership and the right-of-way and track is used exclusively for rail transportation.

DOR prepared a beneficial use tax assessment for each of the Colstrip Owners' interest in the Townsend-Garrison 500 kV transmission line for tax year 1984. DOR used the unit valuation method in arriving at its assessment. The unit approach is applied to all centrally assessed property. (Tr. p. 848) Ms. Whittinghill testified that "that method is used because typically these companies are so thoroughly integrated that it would be hard to ascertain a value for the entire company as a whole, if you tried to go and piecemeal appraise each individual object that the company operates." (Tr. p. 848) The unit approach to valuation utilizes three indicators to obtain a value: the cost indicator, the income indicator, and the market or stock and debt indicator. (Tr. p. 848)

Through the cost indicator, DOR tried to get an idea of what the physical cost of the property would be (Tr. p. 853)

DOR determined that the cost of constructing the Townsend-Garrison line was $92,282,000. It made such determination as follows:

1.	Cost per mile of the Townsend-Garrison 500 kV transmission line (Defendants' Exhibit 1A, page 6 of attachment to Eskridge letter to Whittinghill)	$ 840,900
2.	Number of miles of Townsend-Garrison 500 kV line (Tr. p. 861-862)	95 miles
3.	Cost of line $840,900 x 95 miles (Tr. p. 861)	$ 79,885,500
4.	Cost of line as per first Exhibit D (Tr. p. 862)	$ 73,262,000
5.	Cost of line as per last revised Exhibit D (Tr. p. 862)	$ 123,698,000
6.	Cost of line relied upon by DOR	$ 92,281,833

($79,885,500 + $73,262,000 + $123,698,000) ÷ 3 (Tr. p. 862)

In order to determine the specific interest of each of the Colstrip Owners in the transmission line, DOR looked to the reserved transmission demands set forth in Exhibit D of the Montana Intertie

Agreement. (See p. 12 of this Opinion) The Department totaled the east-west transmission demands for all of the Colstrip Owners and then divided each owner's reserved transmission demand by the total transmission demand. (Tr. p. 864) The resulting percentage represented the reserved transmission capacity that each Colstrip Owner had in the Townsend-Garrison 500 kV transmission line. DOR then multiplied each Owner's percentage by the $92,282,000 cost of the line to arrive at each Owner's allocated cost of the Townsend-Garrison line, as follows:

Pacific	$92,282,000 x 8%	= $ 7,382,560
Puget	$92,282,000 x 40%	= $36,912,800
PGE	$92,282,000 x 16%	= $14,765,120
Washington Water	$92,282,000 x 12%	= $11,073,840
MPC	$92,282,000 x 24%	= $22,. 47,680

(See Defendants' Exhibit 1A)

The resulting allocated cost of the Townsend-Garrison line for each Colstrip Owner was then integrated into each owner's individual cost indicator by adding it to the cost of the owner's other operating property. For example, the cost worksheet of Pacific provides the following categories, of which the beneficial use assessment for the Townsend-Garrison line is only one (figures other than the beneficial use assessment have been deleted): (See Defendants' Ex. 1, p. 2)

	ORIGINAL COST	DEP. RESERVE	OCLD
PLANT:			
Colstrip #3			
Wyodak			
CWIP			
Libby Turbine			
Leased Equipment from others - BPA	$7,382,560	$7,382,562	
Materials & Supplies			(Tr. p. 868)
TOTALS			
ADJUSTMENTS: BPA			
CWIP			

Obsolescence

TOTALS

NON TAXABLE:

Licensed vehicles

TOTAL

The figures to be used for the worksheet would be obtained from the FERC Form 1 which the utilities file each year. (Tr. p. 867)

DOR also used the income indicator for purposes of valuing the operating properties of Pacific for 1984. (Tr. p. 871) Such indicator is used "to relate income and an overall rate to determine value." (Id.) The beneficial use assessment was not treated in the income indicator. Ms. Whittinghill testified that the Colstrip Owners' tax representatives agreed that the beneficial use assessment would be treated only in the cost indicator. (Tr. pp. 872, 1069-1071)

DOR also used the market or stock and debt indicator to value Pacific's properties but without including the beneficial use assessment. DOR then weighted the total cost indicator (of which the beneficial use assessment was part) by 40%, the total income indicator by 50%, and the total market indicator by 10%. (See Defendants' Exhibit 1, p. 3) Then DOR added the three weighted indicators plus the cost of work in progress to reach a total system value of $2,186,654 for Pacific in 1984. Such figure multiplied by the total of the owner's system value subject to assessment in Montana (for Pacific — .05954) resulted in $130,193 to be apportioned to each of the appropriate taxing jurisdictions as per administrative guidelines. Pacific's share of the cost of the Townsend-Garrison line based upon its transmission demand was $7,382,500.

DOR did not assess a beneficial use tax against any user of the Hot Springs to Idaho border portion of the 500 kV transmission line system, because BPA represented that there were no nonfederal users of that transmission line during calendar year 1983 and none of the Colstrip Owners reported any beneficial use interest in the transmission line for calendar year 1983. Other than the 500 kV transmission line extending from Townsend to Garrison, and the portion of the 500 kV transmission line extending from the Hot Springs substation to the Idaho border, there were no other 500 kV

transmission systems in the State of Montana which were otherwise tax exempt during calendar year 1983 and, thus, subject to beneficial use taxation.

DOR did not employ a valuation methodology which was based upon the amount of generation at the Colstrip facilities, the amount of electricity transmitted across the Townsend-Garrison 500 kV transmission line, the act of generating or producing energy at the Colstrip generating plants or the act of transmitting energy from the Colstrip generating plants. The BPA is not obliged, contractually under the terms of the Montana Intertie, to assume any portion of the beneficial use taxes which are levied and assessed against the Colstrip Owners. (Plaintiffs' Ex. 7, Ex. E)

D. HISTORY OF CASE

In mid-1984, DOR notified each Colstrip Owner of DOR's revised 1984 proposed ad valorem valuation of their Montana properties. The valuation included sums attributed to the Colstrip Owners' beneficial use of Townsend-Garrison transmission lines and associated facilities pursuant to Section 15-24-1203, MCA. (Agreed Facts filed September 19, 1986) Plaintiffs paid the tax and filed this cause of action requesting that such tax be refunded with interest.

OPINION

Plaintiffs' Complaint, alleging that the imposition of the beneficial use tax is illegal, sets forth seven counts. Three arise under the United States Constitution — violation of the Supremacy Clause, the Commerce Clause and the Fourteenth Amendment. Three counts involve state constitutional claims and the last claim involves Plaintiffs' beneficial use or lack thereof of the transmission lines.

Each claim is addressed separately below.

1. Supremacy Clause

A state cannot levy a tax directly against the government of the United States or its properties without the consent of Congress. M'Culloch v. Maryland, 4 Wheat 316, 4 L.Ed 579 (1819). However, a tax for the beneficial use of property, as distinguished from a tax on the property itself, has long been commonplace in this country.

Henneford v. Silas Mason Co., 300 U.S. 577, 587, 81 L.Ed 814, 818, 57 S. Ct. 524 (1937). Plaintiffs contend that they do not have possession or control of the 500 kV lines at issue, and therefore the beneficial use tax cannot be assessed against them. In support, Plaintiffs cite three cases: United States v. Detroit, 355 U.S. 467, 2 L.Ed.2d 424, 78 S.Ct. 474 (1958); United States v. Muskegon, 355 U.S. 484, 2 L.Ed.2d 436, 78 S.Ct. 483 (1958); and *Detroit v. Murray Corp.*, 355 U.S. 489, 2 L.Ed.2d 441, 78 S.Ct. 458 (1958). Although there was possession or control of the property at issue in the above cases, none of the decisions, which determined the constitutionality of a beneficial use tax, were based upon possession or control. Furthermore, the Supreme Court in U.S. v. Fresno, 429 U.S. 452, 50 L.Ed.2d 683, 97 S. Ct. 699 (1977) stated as follows:

> "These cases make it clear that a state may, in effect, raise revenues on the basis of property owned by the U.S. as long as that property is being used by a private citizen or corporation and so long as it is the possession or use by the private citizen that is being taxed." (Emphasis supplied)

Plaintiffs' first contention fails.

Secondly, Plaintiffs state that the tax must be set aside if it discriminates against the United States or those with whom it deals. U.S. v. Detroit, 355 U.S. 467, 2 L.Ed.2d 424, 78 S.Ct. 474 (1958). Plaintiffs assert that the beneficial use tax discriminates against them because it inflicts a larger burden on them than they would bear if they had constructed, operated, and maintained the lines themselves. (Trial Brief p. 18) In support, Plaintiffs argue that DOR has imputed to them the full cost of the lines even though they only use 90% of the east-west capability. Plaintiffs agreed, under the Montana Intertie Agreement, to pay the full cost of the lines in exchange for 90% of the east-west capability. (See p. 12 & 13 of this Opinion) Certainly, DOR could not be criticized if it did value the lines at the figure that Plaintiffs, in an arms-length transaction, agreed to pay for 90% of east-west transmission. But DOR did not use such figure. It used only 40% of the amount Colstrip Owners agreed to pay under the Montana Intertie Agreement in order to reach its assessment. (See p. 22 of this Opinion)

Plaintiffs also argue that they are discriminated against because

they were taxed upon the full cost of the line even though the duration of the Montana Intertie Agreement is only 22 years which is 61% of the estimated life of the lines. Again, Plaintiffs agreed to pay full cost for a 22 year contract. Secondly, Plaintiffs were not taxed upon full cost — but only upon 40% of full cost. Lastly, the Montana Intertie Agreement is renewable. (See Plaintiffs' Exhibit 7, p. 5) (See this Opinion at p. 15)

Plaintiffs' argument that they are discriminated against fails.

Thirdly, Plaintiffs argue that the United States Supreme Court in Fresno set forth three factors to determine the validity of a use tax. According to Plaintiffs, those factors are:

a) the legal incidence of the tax;

b) whether the tax is applied in a discriminating manner;

c) whether the tax was based on the total value of the federal interest or only the value of the taxpayer's possessory interest in the property.

Evidently with regard to the second factor, Plaintiffs argue that "because [the tax] is restricted to interstate high voltage 500 kV lines, [it] is structured and implemented so as to have maximum impact upon electric ratepayers residing outside of Montana." (Emphasis in orig.) Plaintiffs are mistaken. The tax is *not* resticted to interstate 500 kV lines. (See Section 12-24-1203, MCA; See p. 17 of this Opinion) It is restricted to lines of a design capacity of 500 kV or more. Other arguments raised by Plaintiffs with regard to the above factors have already been addressed.

Plaintiffs' fourth argument is that the beneficial use tax is statutorily preempted by Section 7(m) of the Regional Act, 16 USC § 839e(m) (1982) and also by § 212(a) of the Tax Reform Act of 1976. After carefully reviewing Section 7(m) of the Regional Act and Mr. Eskridge's testimony, this Court finds that impact aid authorized by that section is not in lieu of taxation. (See Section 7(m) attached to Plaintiffs' Trial Memorandum and Tr. pp. 470-581)

Plaintiffs also assert that the beneficial use tax is preempted by Section 212(a) of the Tax Reform Act. Such section provides for taxation of the generation or transmission of electricity. That is not at issue in this case. Defendants in this case have assessed a tax against Plaintiffs for their beneficial use of a 500 kV line. Plaintiffs argument is, thus, without merit. (See Plaintiffs' Reply Brief, pp. 9-10)

2. Commerce Clause

The parties agree that Complete Auto Transit v. Brady, 430 U.S. 274, 51 L.Ed.2d 326, 97 S.Ct. 1076 (1977) is applicable to this case. There, the United States Supreme Court stated that past decisions:

> "have sustained a tax against Commerce Clause challenge when the tax [1] is applied to an activity with a substantial nexus with the taxing state, [2] is fairly apportioned, [3] does not discriminate against interstate commerce, and, [4] is fairly related to the services provided by the State."

Plaintiffs acknowledge that the location of the BPA transmission lines in Montana constitutes an activity "with a substantial nexus [between BPA and] the taxing State." However, Plaintiffs then argue that there is no nexus because BPA has been directed to make impact aid payments and because Plaintiffs do not own, possess, or operate the Townsend-Garrison lines. Plaintiffs do not elaborate on their argument. It goes almost without saying that Colstrip Owners' contractual right to transmit 1,730 megawatts of power across Montana is a sufficient nexus to the State of Montana.

Plaintiffs concede that the second criterion "is not particularly germane to the present situation" in both their Trial Memorandum and Opening Brief. (Trial Memo p. 36 and Opening Brief p. 54)

With regard to the third criterion, Plaintiffs argue that the beneficial use tax discriminates against interstate commerce in at least two ways. First, Plaintiffs argue that the tax is restricted to transmission facilities that are designed to have the maximum impact upon interstate commerce while exempting therefrom facilities which are designed and constructed to have a lesser impact upon interstate commerce. Plaintiffs are mistaken. The tax applies to the use of 500 kV lines. MPC, who serves mostly Montana consumers, is assessed in the same manner as PGE. The tax impacts intrastate and interstate users of 500 kV lines equally.

Secondly, Plaintiffs argue that the tax is being applied in a discriminating manner in that only the Colstrip Owners have been assessed. Plaintiffs state that Montana electric cooperatives "rely on the existence of the Hot Springs-Dworshak 500 kV line in order to obtain the power they sell to their Montana customers." (Em-

phasis supplied) (Opening Brief p. 56) Plaintiffs also state that "if the Colstrip Owners' arrangement with BPA with regard to the Townsend-Garrison lines constitutes 'beneficial use' so does the cooperatives reliance on BPA." (Opening Brief p. 56) The rural cooperatives may be relying on the BPA to provide power to them but they have no right to the lines. They are merely BPA's customers. By comparison, Colstrip Owners have a contractual right to transmit 1,730 megawatts of power across the Townsend-Garrison lines. The rural cooperatives have no such right.

Plaintiffs also argue that it is discriminating not to tax BPA's other customers for the 500 kV lines. The above discussion with regard to rural cooperatives holds equally true for BPA's other customers.

Lastly, Plaintiffs argue that the taxes bear no relationship to the services provided by the counties to Plaintiffs. However, in Commonwealth Edison v. Montana, 453 U.S. 609, 69 L.Ed.2d 884, 101 S.Ct. 2946 (1981), the United States Supreme Court held that it would not engage in a cost/benefit analysis when state taxes were challenged based upon the Commerce Clause. It stated:

> "A tax is not an assessment of benefits. It is, as we have said, a means of distributing the burden of the cost of government. The only benefit to which the taxpayer is constitutionally entitled is that derived from his enjoyment of the privileges of living in an organized society, established and safeguarded by the devotion of taxes to public purposes. Any other view would preclude the levying of taxes except as they are used to compensate for the burden on those who pay them, and would involve abandonment of the most fundamental principle of government — that it exists primarily to provide for the common good."

Commonwealth Edison at p. 897-898

3. Fourteenth Amendment

All Plaintiffs' fourteenth Amendment arguments have been addressed above.

4. Private Interests

Section 5(1)(a) of Article VIII of the Montana Constitution provides:

> "(1) The legislature may exempt from taxation:
> (a) Property of the United States, the state, counties, cities, towns, school districts, municipal corporations, and public libraries, but any private interest in such property may be taxed separately." (Emphasis supplied)

Based upon a committee comment, Plaintiffs argue that "private interest" is a legal right to physical possession or occupancy – i.e., the taxpayer must have a right to possess or occupy the property before the state may impose a tax upon it. (Trial Memo at p. 46) It is unnecessary to refer to committee comments as the section is clear on its face.

Colstrip Owners have a contractual right to transmit 1,730 megawatts of power across the Townsend-Garrison line. Such right is not a public right. It is Colstrip Owners' private right. Colstrip Owners do have a private interest and thus, may be subject to taxation.

5. Retrospective Laws

Based upon Article XIII, Section I, Clause 3 of the 1972 Montana Constitution, Plaintiffs assert that because they entered into the Montana Intertie Agreement in 1981 and the amendment to Section 15-24-1203, MCA was not enacted until 1983, they cannot be taxed. Plaintiffs have failed to support their contention in any substantial manner. The Court notes that if Plaintiffs were correct, all new forms of taxation would be prohibited.

6. Impairment of Contract

Article II, Section 31 of the 1972 Montana Constitution establishes that the State may not impair the obligation of contract. In their one paragraph addressing this issue, Plaintiffs argue that beneficial use tax impairs the Montana Intertie Agreement. Plaintiffs' argument is rejected pursuant to Bryne v. Fulton Oil Co., 85 Mont. 329, 278 P. 514 (1929) and Forbes v. Mid-Northern Oil Co., 100 Mont. 10, 45 P.2d 673 (1935).

7. Beneficial Use

Section 15-24-1203, MCA, is triggered by possession or beneficial use. Plaintiffs argue that they do not possess or beneficially use the line because they do not have concrete rights in and to the property. Based upon the record, it is clear that the Townsend-Garrison 500 kV line was built specifically to accommodate the interest of the Colstrip Owners. Plaintiffs have a clearly distinguishable use interest in the 500 kV line property from Townsend to Garrison. Plaintiffs' last claim fails.

Plaintiffs have not sustained their burden of proving that the imposition of beneficial use taxes pursuant to Section 15-24-1203, MCA, violates any statutory or constitutional rights. Therefore, this Court finds that such taxes have been lawfully imposed. Such taxes shall be disbursed from the protest accounts in which they are presently being held and shall be distributed as per Section 15-1-402, MCA.

IT IS SO ORDERED

DATED this 21st day of December, 1987.

DISTRICT JUDGE

pc:

No. 88-151

IN THE SUPREME COURT OF THE STATE OF MONTANA 1989

PACIFIC POWER & LIGHT COMPANY,
PUGET SOUND POWER & LIGHT COMPANY,
PORTLAND GENERAL ELECTRIC COMPANY,
WASHINGTON WATER POWER COMPANY,
AND THE MONTANA POWER COMPANY,
Plaintiffs and Appellants,

-vs-

MONTANA DEPARTMENT OF REVENUE,
et al.,
Defendants and Respondents.

APPEAL FROM: District Court of the First Judicial District, In and for the County of Lewis and Clark, The Honorable Henry Loble, Judge presiding.

COUNSEL OF RECORD:

For Appellant:

Donald R. Murray; Murphy, Robinson, et al., Kalispell, MT

Thomas H. Nelson; Stoel, Rives, Boley, Jones & Grey, Portland, Oregon

For Respondent:

Larry Schuster, Montana Department of Revenue, Helena, Montana

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Submitted: February 21, 1989
Decided: April 17, 1989

Mr. Justice L. C. Gulbrandson delivered the Opinion of the Court.

Appellants appeal the order of the First Judicial District Court, Lewis and Clark County, in a declaratory judgment action, upholding the validity of the Montana Department of Revenue's (DOR) assessment of beneficial use taxes for the year 1984 against the appellants pursuant to § 15-24-1203, MCA. These beneficial use taxes were assessed for the appellants' firm transmission demands upon certain Bonneville Power Administration (BPA), 500 kilovolt (KV) transmission lines located between Townsend, Montana and Garrison, Montana. We affirm the order of the District Court.

In the mid-1970s, two mine-mouth, coal-fired electric generating plants were built by Montana Power Company (MPC) and Puget Sound Power and Light Company (Puget), at Colstrip, Montana. Each of these plants produce 330 megawatts of electrical power consuming 30 megawatts internally at each plant. These plants have been operated and maintained by the Montana Power Company since being placed in service in 1975 and 1976.

To market the power produced by Colstrip Units I and II, two 230 KV electrical transmission lines were built to transmit the power from Colstrip to a point near Broadview, Montana. Other 230 KV lines moved the energy from Broadview to markets or "loads" located in western Montana and the Pacific Northwest. This system of 230 KV lines proved adequate for transmitting the energy generated from Colstrip Units I and II.

In the late 1970s and early 1980s, MPC and Puget, in conjunction with Portland General Electric Company (PGE), Washington Water Power Company (WWP) and Pacific Power and Light Company (PPL) foresaw an increased demand in the Pacific Northwest for electrical power. Consequently, they decided to build Colstrip Units III and IV. (Colstrip Units III and IV each have a generation capacity of 770 megawatts (MW) of electrical power with each plant consuming approximately 70 MW internally.) These five companies, the appellants in this case, were the owners of undivided interests in Colstrip Units III and IV at the time of the assessment of the beneficial use taxes which are the subject of this litigation. They shall hereinafter be collectively referred to as the Owners.

Realizing that the existing system of 230 KV transmission lines

would be insufficient to transmit the additional 1,400 MW produced by Colstrip Units III and IV in 1977, the Owners entered into negotiations with the BPA to build two 500 KV transmission lines from Townsend to the BPA's existing 500 KV lines at Taft, Montana.

The Owners would convert the existing 230 KV lines stretching from the Colstrip generating point to a substation located at Broadview, Montana, into 500 KV lines. They then would construct new 500 KV lines from Broadview, Montana to the anticipated BPA 500 KV lines beginning in Townsend.

For its part, the BPA executed two primary agreements with the Owners. These agreements stated the BPA would construct and operate those 500 KV lines referred to as the Montana Intertie line, which runs from Townsend, Montana to Garrison, Montana, and the Garrison West line, which runs from Garrison, Montana, to a point designated as the Taft substation on the Montana-Idaho border. These lines would link with the BPA's currently existing 500 KV system at the Taft substation.

In preparation for Colstrip Unit III going on-line in January, 1984, the BPA completed construction of the 500 KV lines from Townsend, Montana to Garrison. Montana, in 1983. There is no substation at the point where the BPA and Owners' lines meet near Townsend. The BPA completed the Garrison West line in 1986. This facilitated the transmission of Colstrip Unit IV power to the Taft substation and points to the west.

In 1983, the Montana Legislature, realizing use of the proposed BPA 500 KV lines extending from Townsend to Taft would be exempt from state property taxes, passed an amendment to § 15-24-1203, MCA, to close the loophole which provided this tax windfall. The amendment provides for the assessment of a beneficial use tax against users of exempt electrical transmission lines having a 500 KV or greater rating. After passage of this amendment, the DOR began meeting with the Owners, their representatives and the BPA to determine a value for the Montana Intertie line which would be placed in service in 1984.

A definite value for the Montana Intertie line had not been established by early 1984. The DOR thus based its assessment on the average of the initial agreement's project value and estimates of the actual cost of constructing these lines. The resulting value for the

Montana Intertie line was established at $92,000,000. The DOR then factored this value into the cost portion of the standard unitary method and assessed taxes to each owner based upon their firm transmission demands under the Montana Intertie Agreement. The Owners protested the imposition of these beneficial use taxes and this lawsuit resulted.

In 1985 and each subsequent year, the DOR has assessed beneficial use taxes against the Owners for their use of the 500 KV lines referred to in this opinion and in each case the Owners have protested and filed lawsuits seeking declaratory injunctive relief from the imposition of those taxes. The individual facts of those cases are not dealt with in this opinion.

The Owners present seven separate issues in this appeal:

1. Whether the Owners' lacked that sufficient "Beneficial Use" of the subject facilities necessary for the imposition of beneficial use taxes under § 15-24-1203, MCA?
2. Whether the challenged taxes violate the Commerce Clause of the United States Constitution?
3. Whether the challenged taxes violate the Supremacy Clause of the United States Constitution?
4. Whether the challenged taxes violate the guarantee of due process and equal protection found in the Fourteenth Amendment?
5. Whether the challenged taxes violate the "Private Interests" clause of the Montana Constitution?
6. Whether the challenged taxes violate the "Retrospective Laws" clause of the Montana Constitution?
7. Whether the challenged taxes violate the "Impairment of Obligation of Contracts" clause of the Montana Constitution?

BENEFICIAL USE

A state's right to impose beneficial use taxes on a private citizen or corporation's possession or use of property owned by the United States is well established. United States v. County of Fresno (1977), 429 U.S. 452, 462, 97 S.Ct. 699, 704, 50 L.Ed.2d 683, 692. However, these taxes must be imposed equally on others similarly situated. Id. at 462, 97 S.Ct. at 705, 50 L.Ed.2d at 692. The policy reason for allowing these taxes is to prevent the unfair trade advantage accruing to those private users of exempt properties over their competitors who must

pay ad valorem taxes on similar, privately held properties. Id. at 463, 97 S.Ct. at 705, 50 L.Ed.2d at 692-693.

The Owners maintain that the beneficial use taxes may not be imposed upon them as they do not have a beneficial interest in or receive a beneficial use from the 500 KV lines. They contend in order to impose beneficial use taxes the state must show that the Owners have possession of the exempt property and that this possession is exclusive, excluding other users of the lines and restricting physical access to the property. As evidence of their lack of possession or exclusive use, the Owners cite to the following facts. The maintenance and actual operation of the Townsend to Garrison 500 KV lines is controlled by the BPA. The BPA has reserved 185 MW of East to West transmission capacity unto itself and the Owners do not have access to the West to East transmission capacity over the Montana Intertie. Further, the testimony of experts at trial and in depositions established that it is impossible to identify the exact path that electrical power will follow when introduced into an integrated system such as exists between Colstrip and Garrison. In other words, one cannot identify whether the Owners' Colstrip power injected into the system at Colstrip flows over the 500 KV transmission lines or over other existing 230 KV transmission lines which interact with the 500 KV lines at the Broadview and Garrison substations.

We find, however, that the Owners do possess a sufficient beneficial use interest in the 500 KV lines, from Townsend to Garrison, which justifies the imposition of beneficial use taxes.

The United States Supreme Court has defined "beneficial use," in a case arising out of Missoula County, Montana, as follows:

> The expression "beneficial use" or "beneficial ownership or interest" in property is quite frequent in the law, and means, in this connection such a right to its enjoyment as exists where the legal title is in one person and the right to such beneficial use or interest is in another, and where such right is recognized by law, and can be enforced by the courts, at the suit of such owner or of someone on his behalf.

Montana Catholic Missions v. Missoula County (1906), 200 U.S. 118, 127, 26 S.Ct. 197, 200, 50 L.Ed. 398, 402. See also Harrison v. City of Missoula (1965), 146 Mont. 420, 407 P.2d 703. Further the

U.S. Court of Appeals for the Ninth Circuit has recognized a state may tax those contract rights granting such a beneficial use interest. International Paper Co. v. County of Siskiyou (9th Cir. 1974), 515 F.2d 285. In the International Paper Co. case the counties attempted to tax the companies' interest in standing timber located in national forests. Under the sale contracts, title to the timber remained with the Forest Service until it had been cut, scaled and paid for. The Ninth Circuit held that the timber property, from which the company derived profit, was not exempt from taxation merely because the United States retained legal title to it as security. *Id.* at 289, citing S.R.A., Inc. v. State of Minnesota (1946), 327 U.S. 558, 570, 66 S.Ct. 749, 756, 90 L.Ed. 851, 860.

In the present case, the Colstrip Owners have an enforceable contract interest which gives them the right to the beneficial use of firm (a guaranteed level of the available transmission capacity) megawatts of power transmitted over the Montana Intertie line. The Montana Intertie Agreement gave the Owners the right to inject electrical power into and remove electrical power from the lines up to specific maximum megawatts of power. This right is subject only to the BPA's ability to transmit these amounts onward from the Garrison substation. We note the project scheduled power, (the amount of electric power each company schedules on an hour over the Montana Intertie up to the maximum allowed for each Company's East-West transmission demand) remained under the ownership of the Owners.

The Owners have exercised this right and used these lines to transmit power for their own commercial profit-making activities. Further, absent the transmission of any BPA or non-firm energy, the Owners are responsible for the total annual cost of the lines. The total annual cost of the transmission lines includes the cost of the government's investment in the Montana Intertie line and the Garrison substation, the annual cost of operating and maintaining the transmission line system, the BPA's administrative costs attributable to the lines and the cost to BPA of any impact-aid payments. The payment formula provides that the Owners receive a credit for BPA and non-firm transmission over the lines. The Owners are liable for these payments whether they use the lines or not. Under such an arrangement, we find the Owners clearly have a beneficial use interest in the Montana Intertie 500 KV lines.

The Owners contend, however, that even if a beneficial use existed, the interest was not exclusive, and thus it could not be taxed. The Owners assert they have no reservation of the remaining 185 MW of East to West transmission capacity nor to any of the West to East transmission capacity of the lines. Therefore, the imposition of beneficial use taxes resulted in the Owners being taxed on the full value of the property when they only had use of part of the lines. United States v. County of Allegheny (1944), 322 U.S. 174, 64 S.Ct. 908, 88 L.Ed. 1209.

This argument is without merit as the Montana Intertie Agreement provided that the BPA could not exercise its East to West reservation until the Garrison West 500 KV lines were operational. Thus, the BPA had no right to exercise its reservation in 1984, the year in which the taxes in this case were imposed. Secondly, testimony at trial established that the BPA would only allow reservation of a firm transmission demand on the West to East capacity of the lines if a requesting party showed a demonstrated need for use of the lines. Until such a demonstrated need was shown, the only firm transmission users of the lines were the Owners, for whom the lines were constructed, and the BPA.

Testimony at trial established that the Montana Intertie line consisted of two bi-directional 500 KV electrical transmission lines. These bi-directional lines are capable of transmitting electrical power in either direction, however, they are not capable of transmitting power in both directions simultaneously. These lines are stability limited at approximately 2,000 MW, although a BPA employee testified that actual loading of the system at capacity would be lower. In negotiating the Montana Intertie, the Owners and BPA provided for maximum firm transmission demands, East to West, of 1,915 MW. Further, the Owners' intention has been to operate the Colstrip generating units as base loaded units. Base loaded generating units are intended to run at full capacity supplying constant power levels to the system.

We find the Montana Intertie 500 KV lines were built to transmit base load power from East to West. No other parties could use the lines because of the Owners' reservation of more than the amount which could be transmitted beyond the Garrison substation. Until other parties are able to exercise reservations in the lines' transmis-

sion capacity in either direction, at which time the Owners will be credited, the Montana Intertie's total capacity was reserved exclusively to the Owners. Consequently, the State had the statutory right to tax the Owners based upon the full value of the facilities.

COMMERCE CLAUSE

Having found the Owners possessed a taxable beneficial use interest in the exempt facility, we now address the Owners' claims that the imposition of these taxes violated certain sections of the United States and Montana Constitutions. The Owners' first claim is that the imposition of beneficial use taxes on their use of the Montana Intertie line violated the Commerce Clause of the United States Constitution. The Owners contend that the Legislature intended to discriminate against interstate commerce by giving preferential treatment to Montana REA cooperatives and that the DOR has implemented the benefial use statute in a discriminatory manner.

It is well established that a state may raise revenues by taxing a private person or corporation's use of federal property within its jurisdiction, provided the state is taxing the possession or use of the property. United States v. County of Fresno (1977), 429 U.S. 452, 462, 97 S.Ct. 699, 704, 50 L.Ed.2d 683, 692. However, the fact that such a tax may have an impact on interstate commerce will subject the tax to commerce clause scrutiny. Commonwealth Edison Co. v. Montana (1981), 453 U.S. 609, 616, 101 S.Ct. 2946, 2952-2953, 69 L.Ed.2d 884, 893. A state may exact its fair share of the cost of state government from interstate commerce activities within the state, so long as the tax meets the test promulgated in Complete Auto Transit, Inc. v. Brady (1977), 430 U.S. 274, 97 S.Ct. 1076, 51 L.Ed.2d 326. Commonwealth Edison, 453 U.S. at 617, 101 S.Ct. at 2953, 69 L.Ed.2d at 894. The Complete Auto Transit test requires, upon examination of the practical effect of the tax, that the tax be applied to an activity having a substantial nexus with the taxing state, be fairly apportioned, not discriminate against interstate commerce, and be fairly related to the services provided by the taxing state. Complete Auto Transit, 430 U.S. at 279, 97 S.Ct. at 1079, 51 L.Ed.2d at 331.

Applying this test to the facts in this case the Owners' activities, subject to the tax, had a substantial nexus to the State of Montana. They had exclusive contract rights to use approximately 90 miles of

BPA 500 KV transmission lines across Montana. These lines were constructed for the purpose of transmitting the Owners' electrical power generated at Colstrip, Montana to Garrison, Montana, and from there to the Owners' service loads. Further, as the Montana Intertie line is entirely within the state there is no potential for multiple state taxation of the use of the facilities. No other state would have jurisdiction to impose beneficial use taxes on these facilities. See, Commonwealth Edison, 453 U.S. at 617, 101 S.Ct. at 2953, 69 L.Ed.2d at 894.

Similar to the appellants in Commonwealth Edison, the Owners contend the tax assessed had a discriminatory effect on interstate commerce as the majority of the electrical power transmitted over these lines was destined for out-of-state consumers. These beneficial use taxes thus effectively exported the state's tax burden. However, as in Commonwealth Edison, the tax was computed at the same rate regardless of the destination of the power transmitted. MPC and Pacific used the power to service Montana customers and were assessed and taxed in the same manner as the other users of the lines. The fact the Legislature realized the brunt of the tax would fall upon out-of-state users of these lines would not invalidate the tax.

As stated by the United States Supreme Court:

> [M]otives alone will seldom, if ever, invalidate a tax that apart from its motives would be recognized as lawful (Citations omitted.) Least of all will they be permitted to accomplish that result when equity and not preference is the end to be achieved.

Henneford v. Silas Mason Co. (1937), 300 U.S. 577, 586, 57 S.Ct. 524, 528, 81 L.Ed. 814, 820.

The Owners also contend this amendment effectively discriminates against bulk transferors of power by benefiting local users of the federal transmission system and those utilities and cooperatives which use lower capacity transmission lines. In support of this contention the Owners point to the fact the amendment to the statute, § 15-24-1203, MCA, only applies to users of 500 KV and larger electrical transmission lines. However, state legislatures have a wide range of choice when they classify or limit items subject to taxation. Henneford, 300 U.S. at 587, 57 S.Ct. at 529, 81 L.Ed. at 821, citing Bell's Gap R. Co. v. Pennsylvania (1890), 134 U.S. 232, 237, 10 S.Ct.

533, 535, 33 L.Ed. 892, 895; Ohio Oil Co. v. Conway (1930), 281 U.S. 146, 159, 50 S.Ct. 310, 313, 74 L.Ed. 775, 781-782.

In the case at hand, the Legislature has identified a class of users of exempt property. This class consists solely of users of 500 KV and larger electrical transmission lines. These lines are used for the bulk transfer of electrical power. In this specific instance the Owners have contracted with the BPA to construct and operate 500 KV lines. As a result of the Owners' contract with the BPA, the Owners have the use of these lines which they otherwise would have been forced to construct themselves. Absent the implementation of the beneficial use tax, the Owners would have received the use of the Montana Intertie transmission facilities, essential to the sale of Colstrip generated power, free of the taxes they would be subject to if they had constructed the lines themselves. We do not find the effect of the legislation was to unfairly tax out-of-state users of the lines, rather the effect is to prevent all users of such exempt lines from unfairly reaping a tax windfall.

The Owners point to cases where the United States Supreme Court and Federal courts have found that state taxes discriminate against interstate commerce in favor of local businesses or consumers. However, these cases are distinguishable. In Boston Stock Exchange v. State Tax Comm'n (1977), 49 U.S. 318, 97 S.Ct. 599, 50 L.Ed.2d 514, the Supreme Court found a transfer tax on out-of-state sales of stocks violated the commerce clause. The Court found that no state "may 'impose a tax which discriminates against interstate commerce .... by providing a direct commercial advantage to local business.'" Boston Stock Exchange, 429 U.S. at 329, 97 S.Ct. at 607, 50 L.Ed.2d at 524, citing Northwestern States Portland Cement Co. v. Minnesota (1959), 358 U.S. 450, 458, 79 S.Ct. 357, 362, 3 L.Ed.2d 421, 427. In the case at hand, however, the beneficial use tax has been imposed upon both local and interstate users of the 500 KV lines for the purpose of eliminating a tax windfall and competitive advantage which enure to the users of tax exempt federal property. This tax imposes no greater tax liability on interstate users of these lines than on instate users. See Boston Stock Exchange, 429 U.S. at 332, 97 S.Ct. at 608, 50 L.Ed.2d at 526.

Recently in the case of United States v. City of Manassas, Va. (4th Cir. 1987), 830 F.2d 530, the Fourth Circuit Court of Appeals dealt

with a Virginia statute which taxed users of federally owned property, but exempted users of similar state owned property from taxation. There the court found the controlling case for discriminatory state use taxes is Phillips Chemical Co. v. Dumas School Dist. (1960), 361 U.S. 376, 80 S.Ct. 474, 4 L.Ed.2d 384. In Phillips, the Court held such taxes must be examined based on "how other taxpayers similarly situated are treated." requiring "'an examination of the whole tax structure of the state.' Cf. Tradesmens National Bank v. Oklahoma Tax Comm'n, 309 U.S. 560, 568." Phillips, 361 U.S. at 383, 80 S.Ct. at 479, 4 L.Ed.2d at 389. The Phillips Court provided a two-part test for evaluating allegedly discriminatory state use taxes:

> 1) Are the users of federal property treated less favorably than similarly situated users of state property; and
>
> 2) If so, is that discrimination justified in light of the state and federal interest involved.

City of Manassas, 830 F.2d at 534. The Fourth Circuit Court of Appeals in City of Manassas, interpreted the justification in part two of the test as requiring a determination of whether the user of federal exempt property is similarly situated to a user of state exempt property. City of Manassas, 830 F.2d at 534.

At trial the only references to imposition of beneficial use taxes on state exempt property dealt with two short line railroads and the Great Falls Industrial Park. The Bureau Chief for the Intercounty Property Bureau testified that in 1986 the DOR determined these railroads qualified for imposition of beneficial use taxes under § 15-24-1203, MCA. She testified that those taxes were appealed to the State Tax Appeal Board, but that at the time of the trial, January 19, 1987, the railroads were still subject to beneficial use taxation. The Cascade County Assessor testified that the DOR had assessed beneficial use taxes on users of facilities at the Great Falls Industrial Park where the DOR found private parties' use met the requirements of § 15-24-1203, MCA. Neither party introduced any other beneficial use of similarly situated state exempt property, though several instances of beneficial use of other federal exempt properties were described. Based upon the above testimony we do not find the DOR discriminated against users of federal property in favor of similarly situated users of state exempt property.

Since the trial, the 1987 Legislature amended § 15-24-1203, MCA,

to exempt the beneficial use of railroad right-of-way and track acquired by the state through abandonment, provided the state retains ownership and the right-of-way and track are used exclusively for rail transportation. This amendment was not considered by the District Court in its order of December 21, 1987, and we find it is not properly before this Court on appeal. Hanley v. Dept. of Revenue (1983), 207 Mont. 302, 673 P.2d 1257.

The fourth prong of the Complete Auto Transit test questions whether the tax is fairly related to the services provided by the taxing state. In Commonwealth Edison, the Court found the "operating incidence" of the tax was on the mining of coal in Montana. As the tax was measured as a proportion of the value of the coal taken, it was in proper proportion to the appellant's activities in the state. The present case involves an "operating incidence" similar to Commonwealth Edison which falls upon the Owners' beneficial use of exempt electrical transmission lines found within the state. This tax is measured as a percentage of the value of the property in which the Owners possess their beneficial use interest.

> Because it is measured as a percentage of the value of the coal taken, the Montana tax is in "proper proportion" to appellants' activities within the State and, therefore, to their "consequent enjoyment of the opportunities and protections which the State has afforded" in connection with those activities. (Citations omitted.) When a tax is assessed in proportion to a taxpayer's activities or presence in a State, the taxpayer is shouldering its fair share of supporting the State's provision of "police and fire protection, the benefit of a trained work force, and 'the advantages of a civilized society.'" (Citations omitted.)

Commonwealth Edison, 453 U.S. at 626-627, 101 S.Ct. at 2958, 69 L.Ed.2d at 900. As the appropriate level of that tax percentage is a legislative matter, we find the tax fairly reflects the taxpayer's activity in the state. Id. at 626-627, 101 S.Ct. at 2958-2959, 69 L.Ed.2d at 901.

SUPREMACY CLAUSE

The Owners' second claim is that the imposition of beneficial use taxes violated the supremacy clause of the United States Constitu-

tion. The Owners correctly assert there are two means by which a state tax may be invalidated under the supremacy clause. The state statute may be preempted by federal action or the tax may improperly place the legal incidence of the tax upon the property of the federal government.

The Owners contend that two federal statutes do in fact preempt Montana's imposition of beneficial use taxes upon private use of federally owned electrical transmission lines. The first is Section 2121(a) of the Tax Reform Act of 1976, 15 U.S.C. § 391 (Anti-Discrimination Act) (1982). This statute provides:

> No State, or political subdivision thereof, may impose or assess a tax on or with respect to the generation or transmission of electricity which discriminates against out-of-State manufacturers, producers, wholesalers, retailers, or consumers of that electricity. For purposes of this section a tax is discriminatory if it results, either directly or indirectly, in a greater tax burden on electricity which is generated and transmitted in interstate commerce than on electricity which is generated and transmitted in intrastate commerce.

This statute has been examined in Arizona Public Service Co. v. Snead (1979), 441 U.S. 141, 99 S.Ct. 1629, 60 L.Ed.2d 106. There the Court examined New Mexico's tax on electrical generation and complimentary tax credit for electrical sales in New Mexico. The effect of this credit was to eliminate the 2 percent electrical generation tax for sales to New Mexico's electrical consumers, while taxing sales to out-of-state consumers. 15 U.S.C. § 391 (1982) was passed specifically to outlaw such taxes which place a greater tax burden upon electricity generated or transmitted in interstate commerce. The Court found that because the electrical energy tax indirectly discriminated against electricity sold outside the state, it violated the federal statute. Arizona Public Service Co., 441 U.S. at 150, 99 S.Ct. at 1634, 60 L.Ed.2d at 113. The federal statute does not prevent a state from taxing the generation and transmission of electricity, but only requires that interstate and intrastate generation and transmission be treated equally. *Id.* at 150-151, 99 S.Ct. at 1634, 60 L.Ed.2d at 114.

Initially, we note that no credit is provided under Montana's beneficial use tax to anyone affected by its imposition and none is alleged.

Further, the beneficial use tax on 500 KV electrical transmission lines applies equally to intrastate and interstate users of these lines. Testimony at trial established that Montana Power Company removed all of its power from the system at the Garrison substation for transmission to its load customers. MPC as an intrastate user is taxed at the same rate as the other users of the facilities. Also, this tax falls neither upon the generation nor the transmission of electrical power, but upon the use of tax exempt facilities. As such, this tax does not violate 15 U.S.C. § 391.

The Owners next contend 16 U.S.C. § 839(e)(m) preempts § 15-24-1203, MCA. This statute provides for the payment of impact-aid payments to offset the added cost to affected counties for the three construction phases of the Montana Intertie line. The three construction phases are pre-construction, which was complete before the Act was passed, construction, for which the three affected counties received over $150,000 in impact-aid payments, and post-construction. In the post-construction phase the counties may bill the BPA for any services provided as a result of the presence of the lines. The Owners' contention that these impact-aid payments were in lieu of taxes fails in light of testimony at trial. At trial, BPA's project information officer for the Colstrip transmission project testified that these impact-aid payments were not intended to be in lieu of taxes which the counties were losing as a result of federal ownership of the 500 KV lines. This statement is reinforced by U.S. Representative Dingell's statement contained in the environmental impact statement. 48 Fed. Reg. 55765. ("This is not a payment-in-lieu of taxes provision.")

The Owners also advance an implied preemption argument based upon a line of cases holding that preemption may be inferred when a scheme of federal regulation leaves no room for state regulation, or when the regulation is so dominant as to "preclude enforcement of state laws on the same subject." Hillsborough County v. Automated Medical Laboratories (1985), 471 U.S. 707, 105 S.Ct. 2371, 85 L.Ed.2d 714. The argument fails, however, in light of our previous findings regarding statutory preemption. The impact-aid payments contained in 15 U.S.C. § 839(e)(m), do not preclude a state's right to levy taxes on a private party's beneficial use interest in exempt federal transmission facilities. Further, 15 U.S.C. § 391 only precludes the implemen-

tation of a state tax scheme which places a greater tax burden on generation or transmission of electricity placed in interstate commerce. As previously stated the Montana beneficial use tax is levied on the beneficial use of the facilities and is equally applied to interstate and intrastate users of the facilities.

The Owners' last supremacy clause argument is that the legal incidence of the beneficial use tax falls on the federal government. In order to find a state tax on use of such exempt properties unconstitutional under a legal incidence argument, the taxed entity must be "'so intimately connected with the exercise of a power or the performance of a duty' by the Government that taxation of it would be 'a direct interference with the function of government itself.'" United States v. New Mexico (1982), 455 U.S. 720, 736, 102 S.Ct. 1373, 1383, 71 L.Ed.2d 580, 593, citing James v. Dravo Contracting Co. (1937), 302 U.S. 134, 157, 58 S.Ct. 208, 219, 82 L.Ed. 155, 171. Where the legal incidence of the tax falls on a private party, and they are independent entities from the United States, the tax cannot be considered a tax on the government itself. U.S. v. New Mexico, 455 U.S. at 738, 102 S.Ct. at 1385, 71 L.Ed.2d at 594. In the New Mexico case, the government sought to show that beneficial use taxes, based upon management contracts which transferred payment of any state taxes imposed to the federal government, placed the legal incidence of the tax on the federal government. The United States Supreme Court found that the fact the federal property involved was being used for the government's benefit was irrelevant. *Id.* at 739, 102 S.Ct. at 1385, 71 L.Ed.2d at 595. The Court found the contractors remained "distinct entities pursuing 'private ends,' and their actions remained 'commercial activities carried on for profit.'" *Id.* at 739-740, 102 S.Ct. at 1385, 71 L.Ed.2d at 595, citing United States v. Boyd (1964), 378 U.S. 39, 44, 84 S.Ct. 1518, 1521-1522, 12 L.Ed.2d 713, 718. Such a tax does not fall upon the federal government, but rather upon the contractor's independent commercial enterprise.

In the instant case the tax is levied directly upon the Owners for their beneficial use of the federal government's facilities. There is no transfer of the tax liability to the government. In fact, the Montana Intertie Agreement provides any costs the government incurs by way of the Owners' use of these transmission lines are billable annually to the Owners The "legal incidence" of the beneficial use tax in this

case clearly falls upon the Owners and not upon the federal government.

The Owners argue that the imposition of these taxes on the Owners' use of the Montana Intertie line would adversely affect the government's ability to secure adequate lease fees from these types of lines. This argument must fail for two reasons. First, the United States Supreme Court has upheld use taxes even where the government by contract agrees to pay the state use or excise tax. See, James v. Dravo Contracting Co. (1937), 302 U.S. 134, 58 S.Ct. 208, 82 L.Ed. 155. Second, in the contracts which grant the use in this case, the Owners are obligated not only to pay the cost of operating and maintaining the lines each year, (less credits for BPA transmissions and non-firm transmissions), but the cost of constructing these lines as well. Under such an arrangement it is implausible that imposing these taxes upon the use of the exempt lines would adversely impact the government's ability to secure adequate lease values.

FOURTEENTH AMENDMENT

The Owners contend the imposition of beneficial use taxes in this case violates the Due Process Clause and the Equal Protection Clause under the Fourteenth Amendment to the United States Constitution. The Owners contend that the Due Process Clause requires that the amount of the tax must bear some relation to the value of the property assessed against the taxpayer. Norfolk & Western Railway Co. v. Missouri State Tax Commission (1968), 390 U.S. 317, 88 S.Ct. 995, 19 L.Ed.2d 1201. The Owners allege that the defendant counties have conferred no benefit upon the Owners because of their use of the Townsend to Garrison facilities, that the defendant counties have already been fully compensated through the impact-aid portions of the Montana Intertie Agreement and that the taxes imposed are based on the full value of the facilities. Further, the Montana Intertie Agreement gives appellants rights which are far less than full ownership.

State tax statutes will not normally be set aside based upon Due Process Clause violations, except in rare and unusual circumstances. A. Magnano Co. v. Hamilton (1934), 292 U.S. 40, 54 S.Ct. 599, 78 L.Ed. 1109. Further, to attack the tax statute, the appellants must show a failure to satisfy two tests. First, the object of the tax must

lack a nexus with the state imposing the tax, and second, the tax must fail to fairly reflect the taxpayer's activity in the taxing state.

Sufficient nexus with the state has already been established under the Commerce Clause section previously discussed. Additionally, we previously found under the fourth prong of the Complete Auto Transit test, that the tax is fairly related to the services provided by the state. Thus, there is no violation of the Due Process Clause.

The Owners contend the Equal Protection Clause invalidates the beneficial use tax because the state has not equally administered the beneficial use taxes. Raymond v. Chicago Union Traction Co. (1907), 207 U.S. 20, 28 S.Ct. 7, 52 L.Ed. 78; and Larson v. State (1975), 166 Mont. 449, 534 P.2d 854. The Owners claim that the Department has never attempted to apply the beneficial use tax in analogous situations, specifically referring to the Montana Rural Electrification Administration Cooperatives (REAs).

These REAs, as preference customers, are entitled to purchase federal power at a preferred or "Priority Firm Rate." This rate is lower than the rate investor-owned utilities are entitled to when they purchase federal power. These REAs also have a right to first call on federal power, before investor-owned utilities. The Owners claim the beneficial use taxes would be applicable to BPA's preference customers based on their use of the BPA transmission system, including the BPA's 500 KV lines. The Owners also contend this is the first attempt to apply the beneficial use tax upon any entity that did not have "exclusive use" of the subject facilities. The Owners equate exclusive use to a requirement that they have possession of the facilities and transmission lines.

The standard which must be achieved to invalidate the tax on equal protection grounds is one of invidious discrimination, as opposed to the existence of a rational relationship. Lehnhausen v. Lake Shore Auto Parts Co. (1973), 410 U.S. 356, 93 S.Ct. 1001, 35 L.Ed.2d 351. The existence of a rational relationship is met here by the intent to close the loophole which would have allowed these companies to avoid paying any taxes. In regard to the Owners' claims regarding the REAs, we note they do not use the Montana Intertie line, nor possess firm transmission demands in 500 KV lines which may be taxed in 1984, under § 15-24-1203, MCA.

We agree with the DOR that the Legislature was not required to

tax all beneficial users before it could reach the beneficial users of 500 KV lines. ("[T]axation of certain objects need not be universal in nature.") Citing to Louisiana v. Pilsbury (1881), 105 U.S. 278, 26 L.Ed. 109. The Legislature in this case has identified beneficial users of 500 KV lines as a distinct tax classification.

THE MONTANA CONSTITUTION

Additionally, the Owners claim the imposition of beneficial use taxes in this case violates three provisions of the 1972 Montana Constitution. The Owners contend that while Art. VIII, sec. 5(1)(a) allows "private interests" in exempt properties to be taxed separately, such a tax necessarily requires the user to have possession. The Owners base this requirement of possession upon statements made at the Constitutional Convention that in closing an existing loophole the delegates provided for taxation of private interests in government-owned property, "things like right-of-ways and things like that ...." Further, the Owners contend the Montana Supreme Court, in identifying an "interest" in real property as an estate, has implied one must have the right to possess and control property before beneficial use taxes may be imposed. Brown v. Hart (1984), 213 Mont. 517, 692 P.2d 14.

We disagree. What is involved here is a private contractual right to use a portion of the transmission capacity of the exempt Townsend-Garrison line. This private interest in exempt federal lands fits within the plain language employed by the 1972 Constitutional Convention delegates in closing this loophole contained in the prior constitution.

> (1) The legislature may exempt from taxation:
>
> (a) Property of the United States, the state, counties, cities, towns, school districts, municipal corporations, and public libraries, but any private interest in such property may be taxed separately.
>
> . . . .

Art. VIII, sec. 5(1)(a), 1972 Montana Constitution.

The Owners next claim that the imposition of beneficial use taxes on their use of the Montana Intertie line violates Art. XIII, sec. 1(3), prohibiting retrospective laws. Specifically the Owners contend that since the Montana Intertie Agreement was entered in 1981 and § 15-24-1203, MCA, was not amended to specifically include 500 KV

transmission lines until 1983, the effect of imposing these taxes is precisely the type of retrospective action the 1972 Constitutional Convention was prohibiting.

We find several problems with the Owners' argument. First, the argument ignores the ongoing nature of their use of these lines. Second, this contention is weakened by Art. VIII, sec. 5(1)(a) which specifically allows for taxation of the interests conveyed to the Owners under the Montana Intertie Agreement. We agree with the District Court that the position the Owners advance would have the effect of prohibiting all new forms of taxation. "The imposition of a new tax, or an increase in the rate of an old one, is simply one of the usual hazards of the business enterprise." Westfield-Palos v. City of Rancho Palos Verdes (Cal.App. 1977), 141 Cal.Rptr. 36, 42, citing John McShain, Inc. v. District of Columbia (D.C. Cir. 1953), 205 F.2d 882, 883.

> Only where the measuring formula for the tax draws upon such disparate or long past antecedents so as to have little relation to the volume of current business might a business license tax fall on retroactivity grounds. (Citations omitted.)

Westfield-Palos, 141 Cal.Rptr. at 42. We find that the beneficial use tax involved here, like the business license tax in Westfield-Palos applies to the ongoing, current business activity of the Owners. As such, the tax does not violate Art. XIII, sec. 1(3), of the 1972 Montana Constitution.

The Owners' final issue relies on Art. II, sec. 31, of the 1972 Montana Constitution in contending the imposition of these beneficial use taxes constitutes an impairment of their contract with the BPA. This argument is without merit as it has long been established that "[a] contract between individuals cannot have the effect of depriving the state or any municipal subdivision of any power of taxation otherwise belonging to it." Forbes v. Mid-Northern Oil Co. (1935), 100 Mont. 10, 22, 45 P.2d 673, 679, citing Newman v. Commercial Waterway District (Wash. 1923), 217 P. 9. As long as the state does not violate a fundamental right of the individual, the state is free to vary the existing mode of taxation. Forbes, 45 P.2d at 679. As Art. II, sec. 31 of the 1972 Montana Constitution is essentially identical to Art. 3, sec. 11 of the 1889 Montana Constitution, under which the Forbes

case was decided, we find the Owners have presented no reason to find there has been any impairment of their contract.

CONCLUSION

The Owners enjoyed a beneficial use interest in the Montana Intertie Agreement 500 KV lines, which use we hold was properly taxable under § 15-24-1203, MCA. That use was evidenced by the Owners' contractual reservation of firm transmission demands in the lines and the fact the lines were constructed for the purpose of transmitting the Owners' electrical power generated at the Colstrip generating facilities. The State's levy of these beneficial use taxes did not violate the United States Commerce Clause, the United States Supremacy Clause, the Fourteenth Amendment to the United States Constitution, nor the cited sections of the Montana Constitution. Therefore we affirm the order of the District Court.

_____

Justice

We concur:

_____

Chief Justice

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Justices